Supreme Court, U.S.
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No. 04-774

In The

Supreme Court of the United States

BONIFACIO VITUG SAGANA,

Petitioner,

v.

JOAQUIN A. TENORIO, in his official capacity as Secretary of the Department of Labor and Immigration, Commonwealth of the Northern Mariana Islands,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The equal protection and due process clauses prohibit states from discriminating against legally admitted non-residents in employment. *See*, *Truax v. Raich*, 239 U.S. 33 (1915). CNMI labor laws grant legal preferences to residents; sets quotas on employment of aliens, prohibit aliens from seeking and contracting for potential employment, prohibit salary and wage increases for aliens, mandate that aliens have two years prior work experience in the job category, and forbid aliens from working and engaging in certain private enterprises and occupations and government employment at all. Do these laws violate the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

BONIFACIO V. SAGANA, individually; and

JOAQUIN A. TENORIO, in his official capacity as Secretary of the Department of Labor and Immigration, Commonwealth of the Northern Mariana Islands

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PETITION FOR WRIT OF CERTIORARI

Bonifacio Vitug Sagana respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed on September 7, 2004.

OPINIONS BELOW

The original Opinion of the Court of Appeals for the Ninth Circuit was filed on September 7, 2004, it appears as Appendix A-1 to the petition. The Order and Amended Opinion of the Court of Appeals for the Ninth Circuit was issued on October 18, 2004 and is reported at 384 F.3d 731, it appears as Appendix A-23 to the petition. The Order Denying Plaintiff's Motion for Summary Judgment and Dismissing Case With Prejudice of the United States District Court for the Northern Mariana Islands entered on April 9, 2003 is unpublished and is attached as Appendix A-46 this petition.

JURISDICTION

The original Opinion was filed on September 7, 2004. The Petition is being filed within ninety (90) days of the date of issuance. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the due process clause of the Fourteenth Amendment which provides, in pertinent parts:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " Appendix A-70

This case involves the equal protection clause of the Fourteenth Amendment which provides, in pertinent parts:

> " . . . nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

This case involves 42 U.S.C. § 1981 which provides:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory *to make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term *"make and enforce contracts" include the making, performance, modification, and termination of contracts, and the enjoyment of ALL benefits, privileges,*

terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law. Appendix A-79 (emphasis added)

This case involves the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801, Pub. L. No. 94-241, March 24, 1976, 90 Stat. 263. Appendix A-71.

This case involves the Commonwealth Nonresident Workers Act, 3 N. Mar. I. Code §§ 4411, *et. seq.* Appendix A-80.

STATEMENT OF THE CASE

Petitioner Bonifacio V. Sagana, a citizen of the Republic of the Philippines, has lawfully resided and worked for various employers in the Commonwealth of the Northern Mariana Islands (CNMI) since his entry under a work permit in 1991. As the result of the failure of the local Department of Labor and Immigration (DOLI) to process and grant an employment application filed by his then prospective employer, Sagana's employment application was denied. He eventually filed a Complaint in the Commonwealth Superior Court which the government defendants removed to the United States District Court for the Northern Mariana Islands. After the other claims of the Complaint were dismissed or settled, the court ordered the parties to file cross motions for summary judgment on the issue of Petitioner Sagana's claim that the CNMI Department of Labor and Immigration may not restrict his

substantive due process and equal protection rights to freely market his labor in the common occupations of life to any prospective employer without restriction and on equal terms as any citizen for so long a period as plaintiff is lawfully admitted to the CNMI as a nonresident worker. The district court denied Sagana's motion for summary judgment. Appeal was thereafter made to the Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the decision of the district court. Hence, this petition for certiorari.

Mr. Sagana claims the right to freely market his labor to any employer on three independent grounds. First, under 42 U.S.C. § 1981. This statute was enacted to protect aliens from discrimination, and provide them with the same rights as white citizens enjoy to freely market their labor and to make and enjoy all the benefits of contracts to that end. This is referred to as the "white citizen test." The Nonresident Workers Act cannot withstand that test. Binding authority has already established that 42 U.S.C. § 1981 applies within the CNMI, applies to acts by CNMI government officials, and applies to acts of private persons.

The rights afforded under § 1981 are special federal guarantees. Section 1981, together with the Fourteenth Amendment and the other Civil Rights Laws provide federal guarantees against violations of certain rights by states. Pursuant to Covenant § 501(a), the Fourteenth Amendment applies in the CNMI on the same terms as if the CNMI were the state. (Appendix A-72).

Second, Section 1981 protects Mr. Sagana's Fourteenth Amendment rights to the "equal protection of the

laws." Aliens are a suspect class for purposes of Fourteenth Amendment analysis. Accordingly, they are entitled to judicial solicitude because of their inability to employ the means of our democratic system of government to affect change in the rights they are provided. This solicitude is especially important in this case.

In the CNMI, so-called alien-nonresident workers like Mr. Sagana are the majority of the population. Yet they are disenfranchised, their rights are curtailed, and they are discriminated against by their hosts, the minority of the population. The results of this affect nonresident worker liberties and protected property interests. In particular, the CNMI's Nonresident Workers Act (NWA) prohibits Mr. Sagana and other nonresident workers from working in the CNMI without a contract pre-approved by the CNMI's Department of Labor. The NWA also requires employers to post a surety bond and provide medical benefits for all nonresident workers, requirements not applicable to resident workers. The NWA prohibits employment of nonresidents for certain jobs and occupations entirely. This leaves nonresidents in a constant state of indenture to their masters and denies them the right to pursue economic opportunities, even though, like Sagana, they may have resided continuously in the CNMI for many years.

Once a suspect classification appears on the face of a law, any individual member of the class is entitled to application of the strict scrutiny standard of review. Alienage is a suspect classification, and it is undisputed that Mr. Sagana is an alien, and that the Nonresident Workers Act on its face classifies on the basis of alienage. Accordingly, strict scrutiny applies. The standard requires the CNMI to prove it has a compelling interest in treating nonresident workers differently based on their alienage, and that the means chosen to

treat nonresident workers differently are precisely tailored to serve the compelling needs.

Here, the CNMI's asserted compelling need is to institute a discriminatory system of preferences so as to protect resident workers against competition from nonresident workers. This is not, however, a legitimate state interest and the means chosen have not been precisely tailored to ensure that aliens enjoy their substantive rights.

What the Equal Protection and Due Process Clauses of the Fourteenth Amendment require is that when the CNMI admits an alien to live and work here, the CNMI must ensure that he/she is a free person who has the liberty to pursue economic opportunities on the same terms as white citizens. They must be free to make and enjoy the benefits of employment contracts to realize that right as well.

The preference system operating in favor of resident workers and against nonresident workers is pretextual. The NWA is premised on the idea that the employment of nonresident workers must be strictly regulated so that these preferences are enforced and resident workers are employed fully in the private sector before an employer resorts to employing nonresident workers. Yet the facts demonstrate that the government of the CNMI has never effectively enforced these preferences. Resident workers have no effective means of invoking or securing the preference rights they are supposed to enjoy. The CNMI enforces these preferences without standards and on a rare, purely discretionary, and arbitrary basis.

Finally, Mr. Sagana claims his substantive due process right to be free from invidious discrimination and arbitrary government regulation of employment through the imposition of standards that bear no relation to a person's

qualifications to perform a job. This Court has repeatedly held that economic regulation must not serve as a pretext for invidious discrimination against aliens lawfully admitted. *See Truax v. Raich*, 239 U.S. 33 (1915); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948). The Ninth Circuit, however, held that the NWA does not violate the Fourteenth Amendment because "giving job preferences to [CNMI] residents, and protecting the wages and conditions of resident workers" so as to "bolster the CNMI economy" was a "reasonable, important" policy. *Sagana v. Tenorio*, 384 F.3d 731, 741 (9th Cir. 2004). This runs clearly contrary to the Court's holding that labor discrimination to raise the wages of residents is unconstitutional. *See, Takahashi*, 334 U.S. at 426-27 ("This discrimination, patently hostile . . . is in violation of section 1 of the Fourteenth Amendment. . . ."). Further, the decision below conflicts with the Sixth Circuit's determination that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002.) Certiorari should be granted to resolve this conflict.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Ninth Circuit entered a decision in conflict with decisions of other courts of appeals and has decided an important question of law in a way that conflicts with relevant decisions of this Court.

I Certiorari should be granted to resolve a division among the circuit courts and this Court on the issue of the appropriate level of scrutiny in reviewing statutes discriminatory on their face against a suspect class.

The Court of Appeals determined that Sagana "[appealed] both the choice of scrutiny and the decision on the merits" of the district court. Appendix A-39.

Sagana contended below that as a matter of conventional analysis under the Equal Protection Clause of the Fourteenth Amendment, *the NWA is subject to strict scrutiny* and cannot withstand constitutional challenge. The Court of Appeals determined the NWA to be admittedly discriminatory on its face. Appendix A-39

The Court of Appeals, without analysis or discussion of the appropriateness or applicability of strict scrutiny review, limited its consideration to rational basis and intermediate scrutiny and reasoned thusly:

> Equal protection claims are considered under a two-step analysis. First, an appellant must shown that the statute in question "results in members of a certain group being treated differently from other persons based on membership in that group." . . . This hurdle is easily cleared. It is uncontested that the NWA is a discriminatory statute, treating nonresidents differently from residents and citizens. . . .
>
> In the second step, a court assesses the legitimacy of a discriminatory statute under the appropriate level of scrutiny. *The CNMI courts* have twice employed intermediate scrutiny in assessing laws discriminating against or among aliens, including when examining provisions of the NWA. . . . The

> CNMI Government argues that we should exercise rational basis review rather than intermediate scrutiny, because the Covenant grants the CNMI the same plenary immigration power enjoyed by the United States. *We need not reach the question of what level of scrutiny to apply, as the NWA survives under either rational or intermediate levels of review.* (emphasis added)

Appendix A-39

Justice Powell, writing for the majority in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) explained the nature and level of required review, thusly:

> [S]trict scrutiny means that the [government's regulatory] system is not entitled to the usual presumption of validity, that the [government] rather than the complainants must carry a *heavy burden* of justification, that the [government] must demonstrate that its [regulatory] system has been structured with precision, and is *tailored narrowly to serve legitimate objectives* and that it has selected the less drastic means for effectuating its objectives. (quotation marks omitted and emphasis added).

411 U.S. at 16-17.

In *Bernal v. Fainter*, 467 U.S. 216 (1984), the Court, using strict scrutiny, struck down a Texas statute requiring that a notary public be a United States citizen and held that "[i]n order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." 467 U.S. at 219.

Because of the above-stated factors, the circumstances in the CNMI call for more, rather than less, judicial solicitude.

In failing to apply strict scrutiny review, the Court of Appeals placed itself at variance with prior precedential decisions of the Court and in conflict with other circuit courts regarding the appropriate level of review for state statutes discriminatory on their face.

This Court, in *Graham v. Richardson*, 403 U.S. 365 (1971), applied strict scrutiny in declaring certain provisions of welfare laws conditioning benefits on citizenship and imposing durational residency requirement on aliens, as violative of the equal protection clause of the Fourteenth Amendment. The Court reasoned that:

> *classifications based on alienage*, like those based on nationality or race, *are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate.* Accordingly, . . . 'the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.'

Id. at 372 (internal citations, quotation marks, and footnotes omitted) (emphasis added). The Court in *Graham v. Richardson* determined that because alienage classifications are inherently suspect, they are "subject to strict judicial scrutiny whether or not a fundamental right is impaired." *Id.* at 376.

In analyzing challenges under the Equal Protection and Due Process clauses, where a state statute regulates certain "fundamental rights" or makes distinctions between people based on certain "suspect characteristics" the Court has held the regulation subject to "strict scrutiny". And to pass muster under strict scrutiny, the statute must both serve a compelling state purpose and be narrowly

tailored to achieving the purpose. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

In *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), Justice White, writing for the majority, after stating the general rule to be that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate interest, offered that:

> "The general rule gives way, however, when a statute classified by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subject to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling interest . . . Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution." (internal citations omitted).

473 U.S. at 440

In *Toll v. Moreno*, 458 U.S. 1, 20 (1982), Justice Blackmun, concurring, offered the following rationale for the strict scrutiny rule "[b]y labeling aliens a 'discrete and insular' minority" . . . the Court did something more than provide a historical description of their political standing. That label also reflected the Court's considered conclusion that for most legislative purposes there simply are no meaningful differences between resident aliens and

citizens . . . so that aliens and citizens are 'persons similarly circumstanced' who must 'be treated alike' . . . At the same time, both common experience and the unhappy history reflected in our cases . . . demonstrate that aliens have been the victims of irrational discrimination."

Focusing on protection of alien employment, the Court stated in *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973) that "[i]t is established, of course, that an alien is entitled to the shelter of the Equal Protection Clause . . . This protection extends, specifically . . . to aliens who 'work for a living in the common occupations of the community.'" (Internal citations omitted)

Clarifying that strict scrutiny is to be applied when the classification affects either a suspect class *or* impairs a fundamental right, the Court in *Graham* reasoned thusly:

> "It is enough to say that the classification involved in Shapiro was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement. . . . *The classifications involved in the instant cases, on the other hand, are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired. . . .*" (internal citations and references omitted) (emphasis added).

403 U.S. at 375-376

Contrary to the Ninth Circuit Court of Appeals decision below, other circuits apply strict scrutiny to suspect classification.

The First Circuit in *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 976-977 (1st Cir. 1989) has stated the rule and test to be "[i]f legislative distinctions are based on a 'suspect' classification, e.g. race or national origin or disturb some 'fundamental right', then the law must pass strict scrutiny . . . and the state must show a compelling interest incapable of being served by less intrusive means." (internal citations omitted).

And the Fifth Circuit in *Maceluch v. Wysong*, 680 F.2d 1062, 1065 (5th Cir. 1982) has indicated that "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or *alienage*, our decisions presume the constitutionality of the statutory discriminations . . . When fundamental rights or suspect classifications are involved, however, stricter judicial scrutiny is called for." (internal citations omitted) (emphasis added)

The Eighth Circuit in *Stiles v. Blunt*, 912 F.2d 260, 263 (8th Cir. 1990) has stated the rule as being "[s]trict scrutiny" is the most exacting standard of equal protection review. Strict scrutiny review is applied when a challenged classification affects a fundamental constitutional right or a suspect class. . . . Under this standard, we will uphold a classification only if it is "necessary to promote a compelling state interest. Unlike rational relationship review, where the classification is presumed constitutional and the plaintiff bears the burden of proving otherwise, the strict scrutiny test requires the government to prove that it has a compelling interest in the classification it has selected." (internal citations omitted)

Notwithstanding that it had determined Sagana's alienage and hence his membership in the *suspect class* of

alien, the Court of Appeals failed to apply strict scrutiny to the NWA, the level of review deemed appropriate by this Court and other circuit courts. As a result of this division among the circuit courts, the outcome of equal protection litigation under the Fourteenth Amendment in a given case or set of circumstances will be made unpredictable and lend itself to forum shopping for a favorable venue, rather than resolution based on the merits of a particular case. The Court's review is thus warranted and necessary to harmonize jurisprudence between the circuit courts.

II Certiorari should be granted to resolve a division among various circuit courts and this Court on the issue of whether economic protectionism is a legitimate state interest under the Equal Protection Clause.

The Court of Appeals in determining that the statutory proffered purposes of the NWA were reasonable and important purposes and that the discriminatory provisions of the NWA were sufficiently related to them, reasoned thusly:

> "The CNMI legislature has seen fit to *create a temporary class of employees* for the *purpose of bolstering the CNMI economy*, giving job preferences to its residents, and protecting the wages and conditions of resident workers while enforcing a system to control and regulate its visiting laborers. *These are reasonable, important purposes. . . .*
>
> The key provisions of the NWA – those which set a preference for resident workers,§ 4413, create procedures by which the government and employers coordinate to place residents in job

> openings, §§ 4431, 4432, set up a system for the government approval of nonresident labor contracts, §§ 4433, 4434, and facilitate enforcement and administrative review of the NWA program, §§ 4441-46 – *are all sufficiently tied to the purposes stated above*. Sagana has not shown that the NWA is not closely related to the CNMI's important governmental goals of boosting its economy, giving preference to its resident workers, and providing a system of regulating and accounting for its nonresident workforce. The limitation of Sagana's ability to contract his labor under the NWA does not violate his equal protection rights.
>
> . . .
>
> Sagana does not prevail on his equal protection claim whether considered under rational basis review or intermediate scrutiny because he has not carried his burden *to show that the NWA is not closely related to the CNMI's important government goals.*" (emphasis added)

Appendix A-40 to A-42.

The decision, however, fails to meet the burdens of the rational relationship test, let alone the higher standard of scrutiny applicable here.

The Court of Appeals' opinion is contrary to decisional precedent of the Court. And other circuit courts have arrived at conflicting results on the issue of whether economic protectionism of favored groups is a legitimate state interest that can pass constitutional muster under the Fourteenth Amendment.

The Court of Appeals' position, that creating a temporary class of alien employees for purposes of bolstering the

economy is a legitimate state interest, conflicts with that taken by the Sixth Circuit in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) where the court employing the most deferential "rational basis" test, struck down a Tennessee statute that prohibited a person from selling coffins without getting a funeral director's license. The Sixth Circuit in determining that the act's purpose was to protect a discrete group from economic competition, which it deemed not to be a legitimate governmental interest or purpose, reasoned thusly:

> *Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose . . .* ('*Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.*')
>
> . . .
>
> The question before this court is whether requiring those who sell funeral merchandise to be licensed funeral directors bears a rational relationship *to any legitimate purpose other than protecting the economic interests* of licensed funeral directors.

Craigmiles, 312 F.3d 220, 224-25. (internal citations and quotations omitted) (emphasis added)

More recently, however, the Court of Appeals for the Tenth Circuit in *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) upheld a virtually identical Oklahoma statute requiring a person engaged in the sale of funeral merchandise, including caskets, to be a licensed funeral director. The court in *Powers v. Harris* specifically rejected and criticized the Sixth Circuit's holding in *Craigmiles* and

concluded that economic protectionism is a legitimate state interest. However, the Tenth Circuit's decision in *Powers* served to generate further uncertainty by its determination that results in each case could be different depending on the classification of the economic activity concerned as interstate or intrastate. *Powers* at 1218-19. Only a decision of this Court can resolve this split between the circuits.

Earlier, this Court, in analyzing an Arizona statute similar to the NWA, which restricted employment opportunities of lawful alien residents and set numerical quota limitations on employment of alien workers, held that economic protection of residents was not constitutional. "It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, *the ordinary means of livelihood.*" *Truax v. Raich*, 239 U.S. 33, 41 (1915) (emphasis added). As to the alien employment quota, the Court noted, "[w]e have nothing before us to justify the limitation to 20 percent save the Judgment expressed in the enactment. . . ." *Id.* at 43.

The Court in *Truax* was clearly concerned with the wide *breadth* of the Arizona statute's prohibition of employment by lawful aliens which meant that the law was not narrowly tailored. This is reflected, in part, by the Court's observation "that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise," (*Id.* at 40) and that "[t]he restriction now sought to be

sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. *No special public interest with respect to any particular business is shown* that could possibly be deemed to support the enactment, for, as we have said, it relates to every sort. *The discrimination is against aliens as such in competition with citizens* in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law." *Id.* at 43. (emphasis added).

Similarly, the discriminatory prohibitions on employment and work under the NWA are not shown to be related to any specific public interest, nor limited to any particular business, industry, or enterprise. And like the Arizona Act in *Truax*, justification for the discriminatory provisions of the NWA is found solely in the stated legislative purpose and the act itself namely, economic protectionism. The NWA in effect imposes the same prohibition and infringes on the same substantive rights.

Similarly, in *Truax*, *supra*, the Court struck down Arizona's statute establishing a hiring quota in favor of citizens. The NWA contains a similar quota coupled with patently discriminatory preferences and restrictions on work and employment by aliens in private enterprises and restrictions in government employment. *See*, §§ 4436(a) (A-111 to A-112) and 4436(e) of the (NWA), Appendix A-113.

In *Examining Bd. of Eng'rs v. Flores de Otero*, 426 U.S. 572, 605-06 (1976), the Court invalidated a Puerto Rico statute prohibiting aliens from practicing certain occupations. The NWA also prohibits aliens from working in certain occupations § 4434(e)(1) of NWA, Appendix

A-103), and creates a one-to-one ratio in others (§ 4434(e)(2) of the NWA, Appendix A-103). Summarizing the long line of case law preceding *Flores de Otero*, the Court observed "[i]t is with respect to this kind of discrimination that the States have had the greatest difficulty in persuading this Court that their interests are substantial and constitutionally permissible, and that the discrimination is necessary for the safeguarding of those interests." *Id.* at 603.

Aliens in the CNMI suffer under the discriminatory NWA not from a "majoritarian" political process, but from an undemocratic minoritarian political process that excludes them. Both fundamental and historical commitment to democratic and republican forms of government are repudiated when the majority CNMI population, who are aliens, are disenfranchised and yet made to suffer under discriminatory laws enacted by the minority. Nor does the NWA reveal any reasoning to support the quota. *See*, § 4436(a) of NWA, Appendix A-111 to A-112 ("No nonresident worker certificates shall be issued or renewed for an employer (other than a construction company or agricultural employer), unless . . . at least ten percent ("minimum percentage") of the employer's full-time work force in the Commonwealth is comprised of resident workers and that this minimum percentage has increased at least at the rate of two percent per year until such time that resident workers comprise 20 percent of the employer's work force. . . . Employers employing less than five but not more than one employee shall employ at least one full-time resident worker.")

One recent commentator proposes a three step approach in reviewing economic regulation under equal

protection (1) that the court should "address the legitimacy of the justifications that the state actually proffers", (2) "the burden should be on the government to demonstrate . . . that the law in question does advance the asserted objective." and (3) "Courts must not impose on plaintiffs the logical impossibility of proving a negative by defeating every conceivable justification for a law." Timothy Sandefur, Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough, 24 N. Ill. U. L. Rev. 457, 496 (2004).

Implicit in the *Truax* Court's use of the phrase "the ordinary means of earning a livelihood" was its recognition of "the right to obtain support in the ordinary fields of labor. . . ." *Truax,* 239 U.S. at 42.

The Court emphasized the distinction to be drawn between the state's legitimate authority regarding "regulation or distribution of the *public domain* or of the common property or resources of the state . . ." and its regulation of "the conduct of *ordinary private enterprises*." *Id.* at 39-40 (emphasis added).

Because the discrimination in *Truax* was solely intended to protect residents, rather than to protect the public, the Court struck the law down, concluding that "[t]he discrimination is against aliens as such *in competition with citizens in* the described range of *enterprises*, and in our opinion it clearly falls under the condemnation of the fundamental law." *Id.* at 43. "It requires no argument to show that the right to work for a living in the *common occupations of the community* is of *the very essence of the personal freedom and opportunity* that it was the purpose of the Amendment to secure." (internal citations omitted) *Id.* at 41. (emphasis added)

The Court's analysis of these concepts manifests its desire and effort to parse out and therefore distinguish state regulation of employment and work by aliens, in areas of legitimate governmental interest, such as "regulation or distribution of the public domain, or the common property or resources . . . of the state . . ." in contrast to employment in private enterprise. *Id.* at 39.

The Court in *Truax* proceeding from the premise that lawfully admitted aliens are protected by the rights under the 14th Amendment equal protection and due process clauses "to work for a living" described those rights as being "the *very essence of the personal freedom* and *opportunity* that it was the purpose of the Amendment to secure." *Id.* p. 41. (emphasis added). The interest sheltered under the Fourteenth Amendment was described by Justice William O. Douglas as "the most precious liberty that man possesses" namely, the right to earn a living. *Barsky v. Bd. of Regents of the State of New York*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting); *see also, Takahashi v. Fish and Game Commission*, 334 U.S. 410, 420 (1948) ("To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think the ownership is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.")

The issue thus presented by the Ninth Circuit Court of Appeals decision is whether the CNMI may legitimately discriminate between competing classes of workers, for the benefit of one class of workers (residents) against the other (aliens) for the generalized purpose of "bolstering the CNMI economy." Cass Sunstein, commenting on the topic, has written that the Equal Protection Clause prohibits

"distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689 (1984). This is precisely what the NWA does. This Court should grant certiorari to vindicate *Truax* and *Takahashi*'s holding that economic regulations must legitimately advance the public welfare, rather than protecting one economic interest group against another.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Bonifacio V. Sagana

December 6, 2004

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Bonifacio Vitug Sagana, *Plaintiff-Appellant,* v. Joaquin A. Tenorio, in his official capacity as Secretary of the Department of Labor and Immigration, Commonwealth of the Northern Mariana Islands. *Defendant-Appellee.*	No. 03-15779 D.C. No. CV-01-00003-ARM OPINION

Appeal from the United States District Court
for the District of the Northern Mariana Islands
Alex R. Munson, Chief Judge, Presiding

Argued and Submitted
April 30, 2004 – Northern Mariana Islands

Filed September 7, 2004

Before: Mary M. Schroeder, Chief Judge,
Alfred T. Goodwin, and J. Clifford Wallace, Circuit Judges.

Opinion by Judge Goodwin

COUNSEL

Joe Hill, Saipan, MP, for the plaintiff-appellant.

James D. Livingstone, Assistant Attorney General, Saipan, MP, for the defendant-appellee.

OPINION

GOODWIN, Circuit Judge.

Bonifacio Vitug Sagana appeals the district court's denial of his motion for summary judgment challenging the Nonresident Workers Act ("NWA"), 3 N. Mar. I. Code § 4411 *et seq.* (1999), of the Commonwealth of the Northern Mariana Islands ("CNMI"). He argues that the NWA restricts his right to freely market his labor in violation of 42 U.S.C. § 1981 and the Fourteenth Amendment's equal protection and due process clauses. The defendant, Joaquin Tenorio, was sued in his official capacity as the Secretary of the Department of Labor of the CNMI.

The district court dismissed all of Sagana's claims with prejudice. We affirm.

BACKGROUND

I. The CNMI

After the end of World War II, the United Nations designated most of the Micronesian Islands, including the Northern Mariana Islands, as the Trust Territory of the Pacific Islands. The United States became the Trust Territory's administrator, with the responsibility of "promot[ing] the development of the inhabitants of the trust territory toward self-government or independence." *United States ex rel. De Leon v. Guerrero,* 4 F.3d 749, 751 (9th Cir. 1993) (internal quotation marks omitted) (quoting Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, art. 6, § 1 (1947)).

In 1969, the United States began negotiations with the Congress of Micronesia to determine the future political status of the islands. The Marshall Islands, Palau, and

Federated States of Micronesia ultimately became independent states, their relationship with the United States governed by compacts of free association. Unlike neighboring Pacific states, the Northern Mariana Islands split from the rest of the Pacific states and negotiated a permanent political union with the United States. The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America was signed on February 15, 1975, and came into force through Congress's Joint Resolution on March 24, 1976. Pub. L. No. 94-241, 90 Stat. 263 (1976), *reprinted in* 48 U.S.C. § 1801 note (hereinafter "Covenant"). The United States officially terminated the trusteeship over the CNMI on November 3, 1986. *Guerrero,* 4 F.3d at 751 (citing Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986), *reprinted in* 48 U.S.C. § 1681 note).

The Covenant establishes the United States' sovereignty and "ultimate political authority" over the CNMI. Covenant § 101; Marianas Political Status Comm'n, *Section-by-Section Analysis of the Covenant To Establish a Commonwealth of the Northern Mariana Islands* 7 (1975) ("*Section-by-Section Analysis*"). It gives the United States "complete responsibility for and authority with respect to matters relating to foreign affairs and defense. . . ." Covenant § 104. The Covenant expressly makes certain portions of the Constitution, and most laws in existence at the time of the Covenant's enactment, applicable to the CNMI. *Id.* §§ 501, 502. In addition, Congress is given the power to pass laws affecting the CNMI by specifically naming the CNMI in any piece of legislation consistent with the Covenant. *Id.* § 105.

The United States' authority over the CNMI is not, however, absolute. This court has stated, "the authority of

the United States towards the CNMI arises solely under the Covenant." *Hillblom v. United States,* 896 F.2d 426, 429 (9th Cir. 1990); *see CNMI v. Atalig,* 723 F.2d 682, 687 (9th Cir. 1984) (explaining that because of its powers of self-government, the CNMI is not under the plenary authority of the United States). The Covenant guarantees the CNMI a measure of self-government, giving the people of the CNMI control over its internal affairs. *Id.* § 103. Additionally, and more importantly for this case, the Covenant exempts the CNMI from U.S. immigration and naturalization laws and minimum wage laws. Covenant § 503(a), (c). The immigration exemption was originally inserted because the CNMI feared that large numbers of Asian immigrants would migrate to the CNMI under the United States' numerical quotas to take advantage of the CNMI's new affiliation with the United States. Marybeth Herald, *The Northern Mariana Islands: A Change in Course under its Covenant with the United States,* 71 Or. L. Rev. 127, 141 (1992). The exemption from American minimum wage laws reflected sensitivity to the CNMI's economic conditions. *Section-by-Section Analysis* at 57-58.

II. The NWA

The CNMI enacted the NWA in 1983, modeling it after a nonresident workers law that had been part of the Trust Territory Code. 3 N. Mar. I. Code §§ 4411 *et seq.* (1983); Protection of Resident Workers Act, 49 Trust Territory Code § 1 *et seq.* (1970). The NWA sets conditions on and procedures for the hiring of nonresident workers. Citizens are given a general preference for all jobs. § 4413.[1] Employers

[1] Unless otherwise indicated, all section designations are to the NWA, 3 N. Mar. I. Code §§ 4411 *et seq.*

who wish to hire nonresident workers must first notify the CNMI Department of Labor, which attempts to place residents in the position. §§ 4431, 4432. The employer must also guarantee that at least ten percent of his or her workforce is comprised of resident workers. § 4436(a). The Department of Labor preapproves all contracts between employers and nonresident workers. § 4434(a)(1). The employer must provide a surety bond guaranteeing three months of wages, medical coverage, and repatriation expenses for each nonresident worker. § 4435. The law requires employers to pay wages at least biweekly in cash, and to pay any applicable minimum wage, although the industries which employ the vast majority of temporary workers are exempted from standard minimum wage laws. §§ 4436(c); 4437(b); 4 N. Mar. I. Code §§ 9221, 9223 (exempting garment, construction, and domestic laborers). The employer is also responsible for providing for the medical expenses of any nonresident worker and for costs that may arise should the nonresident worker die during the term of employment. § 4437(c). The NWA prohibits or restricts the hiring of nonresident workers for certain specific job classifications. §§ 4434(e)(1)-(2), (h), (i).

Nonresident workers are also subject to certain requirements. When applying to work under the NWA, a nonresident worker must submit an affidavit stating that he or she meets the qualifications of the job being sought, has a minimum of two years of working experience, and has not been convicted of a felony or crime of moral turpitude. §§ 4434(b)(1), (2), (4). The worker must also disclose his or her marital status and the existence of any dependents, § 4434(b)(3), and undergo a physical examination once he or she arrives in the CNMI, § 4438. A nonresident worker is not allowed to work in the CNMI without a

contract preapproved by the Department of Labor, § 4437(d), or for any other employer than the one designated on the approved contract, § 4437(e). Once hired under the NWA, a nonresident worker may not use his or her presence in the CNMI to establish citizenship or residency. § 4437(a).

III. Sagana's History

Sagana entered the CNMI in 1991 as a nonresident worker. After working as a security guard for three years, he was fired, and subsequently pursued a successful action for wrongful termination and unpaid wages. From 1994 to 2000, Sagana worked under temporary work authorization permits or as an unapproved nonresident worker. A nonresident worker employment application allegedly filed by one of Sagana's employers in October 1998 was apparently lost by the Department of Labor and Immigration, and on November 8, 2000, a Department of Labor and Immigration official determined that Sagana did not have valid work status and could not remain in the CNMI. The official ordered Sagana to depart voluntarily within twenty days. Sagana appealed the order without success.

IV. Procedural History

On December 20, 2000, Sagana filed a complaint in the Superior Court of the CNMI for declaratory and injunctive relief, monetary damages, and attorney fees under 42 U.S.C. §§ 1983 and 1988. Defendants removed the case to the CNMI district court on January 16, 2001. Some of the claims in the case were dismissed by the district court's November 23, 2001, order granting in part the defendant's motion for summary judgment; these

claims are not a part of this appeal. All the rest, save one, were settled and the settlement terms memorialized in an Agreement dated November 25, 2002. The Settlement Agreement permitted Sagana to pursue his claim for a declaration whether Sagana "has the right to freely market his labor in the common occupations of life to any prospective employer without restriction and on equal terms as any citizen for so long a period as Plaintiff is lawfully admitted to the CNMI as a nonresident worker."

The district court granted summary judgment for the respondent, Tenorio, and we review that decision *de novo*. *United States v. City of Tacoma,* 332 F.3d 574, 578 (9th Cir. 2003). Upon review, our efforts are somewhat encumbered by the bulk and vague contours of Sagana's claim. The settlement agreement reduced Sagana's case to a claim that he has a right to pursue and engage in work unrestricted by the rules and procedures of the NWA. We will refer to specific sections of the statute only when necessary for analysis.

ANALYSIS

I. 42 U.S.C. § 1981 Claim

A. Dismissal on the Ground of Inadequate Pleading

The district court dismissed Sagana's 42 U.S.C. § 1981 claim on the ground that Sagana failed to raise the claim properly. The district court relied on the failure of the settlement agreement and the failure of Sagana's complaint to specifically mention § 1981.

Under the liberal rules of pleading, a plaintiff need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ.

P. 8(a). All that is required is that the plaintiff give "fair notice" of the claim and its basis. *Conley v. Gibson,* 355 U.S. 41, 47 (1957). "'All pleadings shall be construed as to do substantial justice,' Fed. R. Civ. P. 8(f), and '[n]o technical forms of pleading . . . are required.' Fed. R. Civ. P. 8(e)(1)." *Fontana v. Haskin,* 262 F.3d 871, 877 (9th Cir. 2001).

The district court erred in concluding that the paragraph in the settlement agreement limited the scope of Sagana's claim. Order at 7-8 ("The paragraph does not provide any hint that Sagana is alleging . . . CNMI-sponsored discrimination based on alienage."). The plain text of the paragraph is broad enough to encompass a § 1981 alienage discrimination claim:

> The parties agree that nothing in the Agreement will prevent the Plaintiff from continuing to pursue his claim against Dr. Joaquin Tenorio, in his official capacity as Secretary of [the Department of Labor and Immigration], for declaratory relief regarding the issue of whether he has the right to freely market his labor in the common occupations of life to any prospective employer without restriction and on equal terms as any citizen for so long a period as Plaintiff is lawfully admitted to the CNMI as a nonresident worker.

In both this paragraph and his complaint, Sagana asserts a right to be on "equal terms as any citizen"; he alleges discrimination on the basis of his alien status. He contends that the NWA, in limiting his ability to freely make contracts regarding his employment, violates his federally guaranteed rights. Additionally, Sagana's Motion for Leave to File Supplemental Authorities indicated that he was pursuing a § 1981 claim. *See Am. Timber & Trading Co.*

v. First Nat'l Bank, 690 F.2d 781, 786 (9th Cir. 1982) (holding that one party's pursuit of discovery on an issue put the opposing party on notice of the issue). Tenorio had "fair notice" of the § 1981 claim. *See Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512 (2002); *accord Acequia, Inc. v. Clinton,* 34 F.3d 800, 814 (9th Cir. 1994).

Although Sagana did not explicitly specify § 1981 in his complaint, this omission is not fatal to his claim. "A party need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case." *Am. Timber,* 690 F.2d at 786 (citations omitted); *see also Cabrera v. Martin,* 973 F.2d 735, 745 (9th Cir. 1992) (stating that pleading facts underlying a § 1983 claim without naming the actual statute is sufficient); *Haddock v. Bd. of Dental Exam'rs,* 777 F.2d 462, 464 (9th Cir. 1985); *Greenwood v. Ross,* 778 F.2d 448, 454-55 (8th Cir. 1985). We long ago rejected the argument that a specific statute must be named, describing it as an "attempt to evoke wholly out-moded technical pleading rules." *Bowers v. Campbell,* 505 F.2d 1155, 1157 n.2 (9th Cir. 1974). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz,* 534 U.S. at 514 (citation, brackets and internal quotation marks omitted). Such an extreme circumstance does not exist here.

B. Section 1981 and Alienage Discrimination

In a footnote, the district court stated in the alternative that Sagana's § 1981 claim would have been foreclosed even if the claim had been properly pleaded, because the court would have been compelled by our decision in *Magana*

v. CNMI, 107 F.3d 1436 (9th Cir. 1997), to dismiss a § 1981 claim based on alienage discrimination.[2] *Magana* does not support the footnote. *Magana* did not decide whether § 1981 applies to discrimination on the basis of alienage.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981(a). The right to dispose of one's labor freely by contract is at the heart of the protections afforded by § 1981. *See Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 441 n.78 (1968).

Congress chose with care the word "persons" to replace "citizens" in the statute when, in reenacting the 1866 Civil Rights Act, it extended the safeguards of the civil rights statutes to aliens.[3] *Id.* (citing Cong. Globe, 41st

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[2] The district court footnote reads, in full: "The court concludes that no discussion is necessary regarding Sagana's argument that the Ninth Circuit 'wrongly decided' *Magana* and that § 1981 was really intended to prohibit state-sponsored discrimination based on alienage. The court is bound by *stare decisis* and may not overrule the Ninth Circuit." Order at 6-7 n. 5.

[3] Section 1981 originally appeared as § 1 of the Civil Rights Act of 1866, 14 Stat. 27, and was reenacted and slightly amended by the Act of May 31, 1870, 16 Stat. 144. *See Runyon v. McCrary,* 427 U.S. 160, 168-70 n. 8 (1976). We do not here recapitulate the full legislative history and historical context of § 1981. We instead gratefully acknowledge other courts' thorough investigations into the statute's origins, which provide ample edifying fodder for the hungry reader. *See, e.g., McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 287-96 (1976); *Anderson v. Conboy,* 156 F.3d 167, 172-75 (2d Cir. 1998) (noting that the primary motivation for the 1870 amendment to the statutory text was to protect Chinese aliens from undue discrimination); *Bhandari v. First Nat'l Bank of Commerce,* 829 F.2d 1343, 1345-48 (5th Cir. 1987),

(Continued on following page)

Cong., 2d Sess. 1536 (1870)); *accord Gen. Bldg. Contractors Ass'n., Inc. v. Pennsylvania,* 458 U.S. 375, 386-87 (1982); *Anderson,* 156 F.3d at 173 ("The use of 'persons' rather than 'citizens' was deliberate."). In *Graham v. Richardson,* 403 U.S. 365 (1971), the Supreme Court determined that states could not restrict the eligibility for welfare benefits solely on the basis of alienage. The Court cited § 1981 to show Congress's intention to provide protections to "[a]ll persons within the jurisdiction of the United States," and went on: "The protection of this statute has been held to extend to aliens as well as to citizens." *Id.* at 377 (citing *Takahashi v. Fish & Game Comm'n,* 334 U.S. 410, 419 n.7 (1948)); *see also Duane v. GEICO,* 37 F.3d 1036, 1040 (4th Cir. 1994). In interpreting a different part of § 1981's precursor statute, our court agreed, holding that the phrase "all persons within the jurisdiction of the United States" was specifically intended to encompass aliens. *United States v. Otherson,* 637 F.2d 1276, 1282 (9th Cir. 1980).

The question of who can claim the protections of § 1981 is different from that which asks what protections it affords. Both the Supreme Court and other circuit courts have considered § 1981 to protect primarily against racial discrimination. *See, e.g., Keating v. Carey,* 706 F.2d 377, 384 (2d Cir. 1983) ("[A]lthough the courts have not limited the statute's proscription of racial discrimination by employing a 'technical or restrictive meaning' of 'race,' neither have they strayed far from a racial discrimination analogy." (internal citation omitted)). The text of § 1981

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vacated, 492 U.S. 901 (1989), *reinstated,* 887 F.2d 609 (5th Cir. 1989); *De Malherbe v. Int'l Union of Elevator Constructors,* 438 F.Supp. 1121, 1136-42 (N.D. Cal. 1977).

circumscribes the kinds of protections that may be claimed under its auspices. The guarantee that "all persons" may enjoy the same rights that "white citizens" enjoy does not protect against discrimination on the basis of gender or religion, *Runyon,* 427 U.S. at 167; disability, *Aramburu v. Boeing Co.,* 112 F.3d 1398, 1411 (10th Cir. 1997); age, *Kodish v. United Air Lines, Inc.,* 628 F.2d 1301, 1303 (10th Cir. 1980); or political affiliation, *Keating,* 706 F.2d at 384.

However, the text also supports the interpretation that it bars alienage discrimination. Just as the word "white" indicates that § 1981 bars discrimination on the basis of race,[4] the word "citizen" attests that a person cannot face disadvantage in the activities protected by § 1981 solely because of his or her alien status. For protection against alienage discrimination to be excluded from § 1981, the text would have to disclaim the citizenship distinction by comparing "all persons" to "white persons," or "all citizens" to "white citizens,"[5] instead of "all persons" to "white citizens," as the statute now reads. The significance we attach to the drafters' changing "all citizens" to

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[4] The cases track the courts' heroic efforts to determine what constitutes "white-ness" and "race" for the purposes of a § 1981 claim. *See, e.g., Al-Khazraji v. St. Francis Coll.,* 784 F.2d 505, 517 n. 17 (3d Cir. 1986), *aff'd,* 481 U.S. 604 (1976) (collecting cases considering the claims of "nontraditional" § 1981 plaintiffs).

[5] Sagana's claim of invidious discrimination based on his alien status is unlike a claim under Title VII, which specifies the types of discrimination prohibited (race, color, religion, sex, and national origin). No such specifications limit § 1981's language barring alienage discrimination. *Cf. Espinoza v. Farah Mfg. Co.,* 414 U.S. 86, 95 (1973) (interpreting Title VII to protect aliens but, because the statute specifically names national origin and not alienage as a prohibited distinction, "nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.")

"all persons" to hold that aliens fall under the statute's protections, also compels the conclusion that § 1981 protects against discrimination on the basis of alienage.

The Supreme Court has held that § 1981 prohibits alienage discrimination. *Takahashi,* 334 U.S. at 419-20 ("[§ 1981] and the Fourteenth Amendment on which it rests in part protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color."); *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). More recently, in *Graham,* the Supreme Court cited § 1981 in a Fourteenth Amendment case to show that Congress intended aliens to enjoy broad constitutional rights regardless of their economic circumstances. *Graham,* 403 U.S. at 377. It is settled that § 1981 prohibits governmental discrimination on the basis of alienage. *Bhandari,* 829 F.2d at 1349 n.13; *Anderson,* 156 F.3d at 173-75 (using the text and legislative history of the 1870 Voting Rights Act to show that Congress intended § 1981 to bar alienage discrimination); *Duane,* 37 F.3d at 1040.[6]

Nothing in *Magana* precludes the employment of § 1981 to protect those who suffer discrimination because of their alienage. In *Magana,* we reversed the district court's holding that a plaintiff could not seek remedy under § 1981 for discrimination based upon the plaintiff's "nation of origin." *Magana,* 107 F.3d at 1446. *Magana* held

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[6] Decisions from other circuits make clear that distinctions made by governmental actors come within § 1981's purview. The current controversy over alienage discrimination under § 1981 focuses on whether private distinctions on the basis of alienage are barred. *Compare Bhandari,* 829 F.2d at 1349, 1351-52 (holding that § 1981 does not prohibit private alienage discrimination) *with Duane,* 37 F.3d at 1042-43 (§ 1981 does prohibit private alienage discrimination) *and Anderson,* 156 F.3d at 180 (same).

that the plaintiff had, in fact, successfully alleged a claim of discrimination based on "race, ancestral or ethnic discrimination," and had therefore avoided the direct question of whether "nation of origin" discrimination could support a § 1981 claim. *Id.* at 1447.[7] *Magana* may be read to imply that § 1981 does not protect against discrimination on the basis of *national origin,* and such a reading would be consistent with the Supreme Court's language and plain holdings of our sister circuits. *See St. Francis Coll. v. Al-Khazraji,* 481 U.S. 604, 613 (1987) (indicating that a claim based "solely on the place or nation of his origin, or his religion" could not form the basis of a § 1981 claim); *Anooya v. Hilton Hotels Corp.,* 733 F.2d 48, 50 (7th Cir. 1984) (per curiam); *Keating,* 706 F.2d at 384; *Bullard v. OMI Ga., Inc.,* 640 F.2d 632, 634 (5th Cir. Unit B Mar. 1981). This does not foreclose § 1981's recognition of alienage discrimination. "Alienage discrimination is distinct from both national-origin and birthplace discrimination." *Anderson,*

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[7] The most relevant parts of *Magana* state:

> In addressing Magana's § 1981 claim, the district court cited portions of Magana's deposition. The court noted that when Magana was asked by why she thought she was being discriminated against, she answered: "because she was from the Philippines." From this, the court concluded that Magana alleged possible "nation of origin" discrimination, rather than racial, ancestral or ethnic discrimination. . . .
>
> The deposition transcript and Magana's complaint demonstrate that Magana . . . did not limit her discrimination allegations to national origin. She also alleged racial, ancestral or ethnic discrimination and consistently alleged that she was discriminated against "because of her race."
>
> . . .
>
> We are satisfied that her pleadings met the requirements for a claim of discrimination under § 1981.

Magana, 107 F.3d at 1446-47 (citations omitted).

156 F.3d at 171 n.5; *accord Espinoza,* 414 U.S. at 95 (holding that a statute that specifically prohibited national-origin discrimination did not protect against alienage discrimination). Any language in *Magana* about national-origin discrimination has no bearing on alienage discrimination claims under § 1981.

We hold that § 1981 prohibits governmental discrimination on the basis of alienage.

C. Application of § 1981 in the CNMI

Tenorio argues that the district court's dismissal was also correct because § 1981 does not apply to the CNMI's immigration laws. Tenorio argues that the exemption in Covenant § 503(a) handed a generalized immigration power to the CNMI and that this power entitles the CNMI to plenary authority and judicial deference in its regulation of aliens. Tenorio reads more into § 503(a) than the section was intended to carry.

Immigration authority controls, who, where, when, how, and for how long, and the conditions under which, a visitor may enter and remain in a territory, but it does not necessarily deal with all the rights and duties of persons in a given jurisdiction after the entry has taken place. We need not reach the outer limits of the power of the CNMI with reference to residents, nonresidents, temporary workers, and other visitors.

The Covenant provides that, with a few exceptions, all laws in existence at the time of the Covenant's passage apply in the CNMI. Covenant § 502(a). The CNMI agreed to be bound by the dictates of the Thirteenth and Fourteenth

Amendments and the statutes enforcing them. *Id.* §§ 501(a), 502(a).

In short, nothing in Covenant § 503 prevented the district court from reaching the merits on this issue.

II. Fourteenth Amendment Equal Protection Claim

The district court ruled against that part of Sagana's claim asserted under the Fourteenth Amendment's Equal Protection Clause, applying rational basis scrutiny to deny his challenge to the NWA. Sagana appeals both the choice of scrutiny and the decision on the merits.

The Fourteenth Amendment applies to the CNMI "as if the Northern Mariana Islands were one of the several states." *Id.* § 501(a); *Basiente v. Glickman,* 242 F.3d 1137, 1143 (9th Cir. 2001); *Madarang v. Bermudes,* 889 F.2d 251, 252 (9th Cir. 1989). Aliens who are in the jurisdiction of the United States under any status, even as illegal entrants or under a legal fiction, are entitled to the protections of the Fourteenth Amendment. *Plyler v. Doe,* 457 U.S. 202, 211 (1982); *Yick Wo,* 118 U.S. at 369; *Wong v. INS,* 373 F.3d 952, 972-74 (9th Cir. 2004).

Equal protection claims are considered under a two-step analysis. First, an appellant must show that the statute in question "results in members of a certain group being treated differently from other persons based on membership in that group." *United States v. Lopez-Flores,* 63 F.3d 1468, 1472 (9th Cir. 1995). This hurdle is easily cleared. It is uncontested that the NWA is a discriminatory statute, treating nonresidents differently from residents and citizens. Order at 11; *see* 4 N. Mar. I. Code § 4411 (1999).

In the second step, a court assesses the legitimacy of a discriminatory statute under the appropriate level of scrutiny. The CNMI courts have twice employed intermediate scrutiny in assessing laws discriminating against or among aliens, including when examining provisions of the NWA. *Sirilan,* 1 N. Mar. I. Commw. Rptr. at 1118-19 (rejecting, under intermediate scrutiny, a CNMI constitutional challenge to the termination of the CNMI permanent resident program); *Kin v. N. Mariana Islands*, 3 N. Mar. I. Commw. Rptr. 608, 612 (D.N. Mar. I. 1989) (applying intermediate scrutiny under the U.S. Constitution to strike down an NWA section that provided for the retroactive deportation of the families of workers earning less than $20,000 per year); *see also Kei v. Amer. Int'l Knitters Corp.*, 789 F. Supp. 1074, 1078 (D.N.M.I. 1992) (holding that a provision of the NWA would fail under either rational or intermediate scrutiny). The CNMI government argues that we should exercise rational basis review rather than intermediate scrutiny, because the Covenant grants the CNMI the same plenary immigration power enjoyed by the United States. We need not reach the question of what level of scrutiny to apply, as the NWA survives under either rational or intermediate levels of review.

When enacting the NWA, the CNMI legislature stated that "it is essential to a balanced and stable economy in the Commonwealth that residents be given preference in employment and that any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers." § 4411(a); *see also Saipan Hotel v. NLRB,* 114 F.3d 994, 996 (9th Cir. 1997). The legislature also recognized that the stagnant CNMI economy needed temporary alien labor

because the small resident working force was substantially occupied in public sector employment. § 4411(a). Additionally, the legislature sought to provide "enforcement, control and regulation of nonresident workers." § 4411(b).

The CNMI legislature has seen fit to create a temporary class of employees for the purpose of bolstering the CNMI economy, giving job preference to its residents, and protecting the wages and conditions of resident workers while enforcing a system to control and regulate its visiting laborers. These are reasonable, important purposes. *See Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 893 (1984) (recognizing the protection of American workers as a legitimate goal of immigration restrictions); *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183, 194 (1991) (same); *Kin*, 3 N. Mar. I. Commw. Rptr. at 613 (finding that "controlling and regulating nonresident workers is an important governmental interest").

The key provisions of the NWA – those which set a preference for resident workers, § 4413, create procedures by which the government and employers coordinate to place residents in job openings, §§ 4431, 4432, set up a system for the government approval of nonresident labor contracts, §§ 4433, 4434, and facilitate enforcement and administrative review of the NWA program, §§ 4441-46 – are all sufficiently tied to the purposes stated above. Sagana has not shown that the NWA is not closely related to the CNMI's important governmental goals of boosting its economy, giving preference to its resident workers, and providing a system of regulating and accounting for its nonresident workforce. The limitation of Sagana's ability to contract his labor under the NWA does not violate his equal protection rights.

In holding that the NWA as a whole passes both rational basis review and intermediate scrutiny, we take no position on whether individual sections of the NWA would satisfy a more focused Equal Protection challenge. Our decision does not foreclose the possibility that discrete elements of the CNMI's temporary worker program could violate the equal protection rights of nonresident workers.[8]

Sagana does not prevail on his equal protection claim whether considered under rational basis review or intermediate scrutiny because he has not carried his burden to show that the NWA is not closely related to the CNMI's important government goals. Accordingly, the district court did not err in denying relief on Sagana's equal protection claim. We turn now to Sagana's due process claim.

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[8] Two separate provisions of the NWA already have been struck down on equal protection grounds. Section 4437(i) was found to violate equal protection by providing that immediate relatives of nonresident workers could not enter the CNMI unless the nonresident worker earned more than $20,000 and posted a bond to guarantee his or her dependents' repatriation costs. *Kin*, 3 N. Mar. I. Commw. Rptr. 608. Section 4434(f), barring nonworker residents from accessing the courts, was also stricken as unconstitutional. *Kei*, 789 F. upp. 1074.

III. Fourteenth Amendment's So-Called Substantive Due Process[9] Claim

The Fourteenth Amendment's Due Process Clause states, "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law." The substantive component of this Clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them. . . ." *Daniels v. Williams,* 474 U.S. 327, 331 (1986) (citation omitted). By doing so, "it serves to prevent governmental power from being 'used for purposes of oppression.'" *Id.* at 331-32 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272, 277 (1855)). The Due Process Clause prohibits restraints on liberty that are arbitrary and purposeless, *Poe v. Ullman,* 367 U.S. 497, 543 (1961), but a claim under this clause is "cognizable only if there is a recognized liberty or property interest at stake." *Schroeder v. McDonald,* 55 F.3d 454, 462 (9th Cir. 1995) (citing *Board of Regents v. Roth,* 408 U.S. 564, 569 (1972)); *see also Wedges/Ledges of Cal., Inc. v. City of Phoenix,* 24 F.3d 56, 62 (9th Cir. 1994). "[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they

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[9] This linguistically awkward juxtaposition of substance and process has embedded itself in constitutional jurisprudence, over the objection of some Supreme Court Justices and scholars. *See, e.g., Bowers v. Hardwick,* 478 U.S. 186, 191 (1986); Alexander M. Bickel, *The Morality of Consent* (1975); John Hart Ely, *Foreword: On Discovering Fundamental Values,* 92 Harv. L. Rev. 5 (1978); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 Yale L.J. 221 (1973).

were sacrificed." *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted).

Restrictions on selecting and pursuing work are recognized by the Fourteenth Amendment's Due Process Clause. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich,* 239 U.S. 33, 41 (1915) (citations omitted). More recently, the Supreme Court stated that "the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment." *Conn v. Gabbert,* 526 U.S. 286, 291-92 (1999); *see also Ry. Employees' Dep't v. Hanson,* 351 U.S. 225, 234 (1956) ("[T]he right to work, which the Court has frequently included in the concept of 'liberty' within the meaning of the Due Process Clauses may not be denied by the Congress." (citations omitted)); *Schware v. Bd. of Bar Exam'rs,* 353 U.S. 232, 238-39 (1957); *Terrace v. Thompson,* 263 U.S. 197, 215 (1923) (protecting the "right to earn a livelihood by following the ordinary occupations of life"); *Dittman v. California,* 191 F.3d 1020, 1029 (9th Cir. 1999).

However, as we recognized in *Dittman,* 191 F.3d at 1031 n.5, the Court has never held that the right to pursue work is a fundamental right. The Court has stated that the "generalized" right to choose one's employment "is nevertheless subject to reasonable government regulation." *Conn,* 526 U.S. at 292. Our court has described the judicial review which applies to laws infringing on non-fundamental rights as a very narrow one. "[W]e do not require that the government's action actually advance its

stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." *Wedges/Ledges,* 24 F.3d at 66 (emphasis in original). Sagana's claim fails. As explained above, there are legitimate reasons for creating and maintaining a temporary worker program, and in pursuing those goals, the CNMI violates no constitutional principles by conditioning an alien's entry on his or her willingness to enter into limited labor contracts.

IV. Conclusion

Our task here is to determine only whether the CNMI, by limiting a nonresident alien's ability to seek and engage in employment as a condition for entry, violates that alien's constitutional rights under the Fourteenth Amendment. Viewed at that level of abstraction, the NWA withstands challenge. We affirm the district court's summary judgment for the respondent on the equal protection and due process claims. Although we reject the district court's conclusion that Sagana did not properly plead his § 1981 claim, we affirm the district court's dismissal on its merits, consistent with our holding on the equal protection claim. *See Gratz v. Bollinger,* 539 U.S. 244, 275-76 (2003); *Grutter v. Bollinger,* 539 U.S. 306, 343 (2003) (citing *Gen. Bldg. Contractors Ass'n,* 458 U.S. at 389-91, for the proposition that "the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause").

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BONIFACIO VITUG SAGANA,
Plaintiff-Appellant,

v.

JOAQUIN A. TENORIO, in his official capacity as Secretary of the Department of Labor and Immigration, Commonwealth of the Northern Mariana Islands,
Defendant-Appellee.

No. 03-15779

D.C. No.
CV-01-00003-ARM

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the District of the Northern Mariana Islands
Alex R. Munson, Chief Judge, Presiding

Argued and Submitted
April 30, 2004 – Northern Mariana Islands

Filed September 7, 2004
Amended October 18, 2004

Before: Mary M. Schroeder, Chief Judge,
Alfred T. Goodwin, and J. Clifford Wallace, Circuit Judges.

Opinion by Judge Goodwin

COUNSEL

Joe Hill, Saipan, MP, for the plaintiff-appellant.

James D. Livingstone, Assistant Attorney General, Saipan, MP, for the defendant-appellee.

ORDER

The opinion filed September 7, 2004, slip op. 12905, is amended as follows:

1. On page 12922, line 13: replace the citation reading "*Kei v. Amer. Int'l Kinters Corp.*, 789 F. Supp. 1074, 1078 (D.N.M.I. 1992)" with "*Yang v. Amer. Int'l Knitters Corp.*, 789 F. Supp. 1074, 1078 (D.N.M.I. 1992)".

2. On page 12923, n. 8: replace the corresponding short citation, "*Kei*, 789 F. Supp. 1074" with "*Yang*, 789 F. Supp. 1074".

OPINION

GOODWIN, Circuit Judge:

Bonifacio Vitug Sagana appeals the district court's denial of his motion for summary judgment challenging the Nonresident Workers Act ("NWA"), 3 N. Mar. I. Code § 4411 *et seq.* (1999), of the Commonwealth of the Northern Mariana Islands ("CNMI"). He argues that the NWA restricts his right to freely market his labor in violation of 42 U.S.C. § 1981 and the Fourteenth Amendment's equal protection and due process clauses. The defendant, Joaquin Tenorio, was sued in his official capacity as the Secretary of the Department of Labor of the CNMI.

The district court dismissed all of Sagana's claims with prejudice. We affirm.

BACKGROUND

I. The CNMI

After the end of World War II, the United Nations designated most of the Micronesian Islands, including the Northern Mariana Islands, as the Trust Territory of the Pacific Islands. The United States became the Trust Territory's administrator, with the responsibility of "promot[ing] the development of the inhabitants of the trust territory toward self-government or independence." *United States ex rel. De Leon v. Guerrero,* 4 F.3d 749, 751 (9th Cir. 1993) (internal quotation marks omitted) (quoting Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, art. 6, § 1 (1947)).

In 1969, the United States began negotiations with the Congress of Micronesia to determine the future political status of the islands. The Marshall Islands, Palau, and Federated States of Micronesia ultimately became independent states, their relationship with the United States governed by compacts of free association. Unlike neighboring Pacific states, the Northern Mariana Islands split from the rest of the Pacific states and negotiated a permanent political union with the United States. The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America was signed on February 15, 1975, and came into force through Congress's Joint Resolution on March 24, 1976. Pub. L. No. 94-241, 90 Stat. 263 (1976), *reprinted in* 48 U.S.C. § 1801 note (hereinafter "Covenant"). The United States officially terminated the trusteeship over the CNMI on November 3, 1986. *Guerrero,* 4 F.3d at 751 (citing Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986), *reprinted in* 48 U.S.C. § 1681 note).

The Covenant establishes the United States' sovereignty and "ultimate political authority" over the CNMI. Covenant § 101; Marianas Political Status Comm'n, *Section-by-Section Analysis of the Covenant To Establish a Commonwealth of the Northern Mariana Islands* 7 (1975) ("*Section-by-Section Analysis*"). It gives the United States "complete responsibility for and authority with respect to matters relating to foreign affairs and defense. . . . " Covenant § 104. The Covenant expressly makes certain portions of the Constitution, and most laws in existence at the time of the Covenant's enactment, applicable to the CNMI. *Id.* §§ 501, 502. In addition, Congress is given the power to pass laws affecting the CNMI by specifically naming the CNMI in any piece of legislation consistent with the Covenant. *Id.* § 105.

The United States' authority over the CNMI is not, however, absolute. This court has stated, "the authority of the United States towards the CNMI arises solely under the Covenant." *Hillblom v. United States,* 896 F.2d 426, 429 (9th Cir. 1990); *see CNMI v. Atalig,* 723 F.2d 682, 687 (9th Cir. 1984) (explaining that because of its powers of self-government, the CNMI is not under the plenary authority of the United States). The Covenant guarantees the CNMI a measure of self-government, giving the people of the CNMI control over its internal affairs. *Id.* § 103. Additionally, and more importantly for this case, the Covenant exempts the CNMI from U.S. immigration and naturalization laws and minimum wage laws. Covenant § 503(a), (c). The immigration exemption was originally inserted because the CNMI feared that large numbers of Asian immigrants would migrate to the CNMI under the United States' numerical quotas to take advantage of the CNMI's new affiliation with the United States. Marybeth

Herald, *The Northern Mariana Islands: A Change in Course under its Covenant with the United States,* 71 Or. L. Rev. 127, 141 (1992). The exemption from American minimum wage laws reflected sensitivity to the CNMI's economic conditions. *Section-by-Section Analysis* at 57-58.

II. The NWA

The CNMI enacted the NWA in 1983, modeling it after a nonresident workers law that had been part of the Trust Territory Code. 3 N. Mar. I. Code §§ 4411 *et seq.* (1983); Protection of Resident Workers Act, 49 Trust Territory Code § 1 *et seq.* (1970). The NWA sets conditions on and procedures for the hiring of nonresident workers. Citizens are given a general preference for all jobs. § 4413.[1] Employers who wish to hire nonresident workers must first notify the CNMI Department of Labor, which attempts to place residents in the position. §§ 4431, 4432. The employer must also guarantee that at least ten percent of his or her workforce is comprised of resident workers. § 4436(a). The Department of Labor preapproves all contracts between employers and nonresident workers. § 4434(a)(1). The employer must provide a surety bond guaranteeing three months of wages, medical coverage, and repatriation expenses for each nonresident worker. § 4435. The law requires employers to pay wages at least biweekly in cash, and to pay any applicable minimum wage, although the industries which employ the vast majority of temporary workers are exempted from standard minimum wage laws. §§ 4436(c); 4437(b); 4 N. Mar. I.

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[1] Unless otherwise indicated, all section designations are to the NWA, 3 N. Mar. I. Code §§ 4411 *et seq.*

Code §§ 9221, 9223 (exempting garment, construction, and domestic laborers). The employer is also responsible for providing for the medical expenses of any nonresident worker and for costs that may arise should the nonresident worker die during the term of employment. § 4437(c). The NWA prohibits or restricts the hiring of nonresident workers for certain specific job classifications. §§ 4434(e)(1)-(2), (h), (i).

Nonresident workers are also subject to certain requirements. When applying to work under the NWA, a nonresident worker must submit an affidavit stating that he or she meets the qualifications of the job being sought, has a minimum of two years of working experience, and has not been convicted of a felony or crime of moral turpitude. §§ 4434(b)(1), (2), (4). The worker must also disclose his or her marital status and the existence of any dependents, § 4434(b)(3), and undergo a physical examination once he or she arrives in the CNMI, § 4438. A nonresident worker is not allowed to work in the CNMI without a contract preapproved by the Department of Labor, § 4437(d), or for any other employer than the one designated on the approved contract, § 4437(e). Once hired under the NWA, a nonresident worker may not use his or her presence in the CNMI to establish citizenship or residency. § 4437(a).

III. Sagana's History

Sagana entered the CNMI in 1991 as a nonresident worker. After working as a security guard for three years, he was fired, and subsequently pursued a successful action for wrongful termination and unpaid wages. From 1994 to 2000, Sagana worked under temporary work authorization

permits or as an unapproved nonresident worker. A nonresident worker employment application allegedly filed by one of Sagana's employers in October 1998 was apparently lost by the Department of Labor and Immigration, and on November 8, 2000, a Department of Labor and Immigration official determined that Sagana did not have valid work status and could not remain in the CNMI. The official ordered Sagana to depart voluntarily within twenty days. Sagana appealed the order without success.

IV. Procedural History

On December 20, 2000, Sagana filed a complaint in the Superior Court of the CNMI for declaratory and injunctive relief, monetary damages, and attorney fees under 42 U.S.C. §§ 1983 and 1988. Defendants removed the case to the CNMI district court on January 16, 2001. Some of the claims in the case were dismissed by the district court's November 23, 2001, order granting in part the defendant's motion for summary judgment; these claims are not a part of this appeal. All the rest, save one, were settled and the settlement terms memorialized in an Agreement dated November 25, 2002. The Settlement Agreement permitted Sagana to pursue his claim for a declaration whether Sagana "has the right to freely market his labor in the common occupations of life to any prospective employer without restriction and on equal terms as any citizen for so long a period as Plaintiff is lawfully admitted to the CNMI as a nonresident worker."

The district court granted summary judgment for the respondent, Tenorio, and we review that decision *de novo*. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir. 2003). Upon review, our efforts are somewhat encumbered

by the bulk and vague contours of Sagana's claim. The settlement agreement reduced Sagana's case to a claim that he has a right to pursue and engage in work unrestricted by the rules and procedures of the NWA. We will refer to specific sections of the statute only when necessary for analysis.

ANALYSIS

I. 42 U.S.C. § 1981 Claim

A. Dismissal on the Ground of Inadequate Pleading

The district court dismissed Sagana's 42 U.S.C. § 1981 claim on the ground that Sagana failed to raise the claim properly. The district court relied on the failure of the settlement agreement and the failure of Sagana's complaint to specifically mention § 1981.

Under the liberal rules of pleading, a plaintiff need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). All that is required is that the plaintiff give "fair notice" of the claim and its basis. *Conley v. Gibson,* 355 U.S. 41, 47 (1957). "'All pleadings shall be construed as to do substantial justice,' Fed. R. Civ. P. 8(f), and '[n]o technical forms of pleading . . . are required.' Fed. R. Civ. P. 8(e)(1)." *Fontana v. Haskin,* 262 F.3d 871, 877 (9th Cir. 2001).

The district court erred in concluding that the paragraph in the settlement agreement limited the scope of Sagana's claim. Order at 7-8 ("The paragraph does not provide any hint that Sagana is alleging . . . CNMI-sponsored discrimination based on alienage."). The plain

text of the paragraph is broad enough to encompass a § 1981 alienage discrimination claim:

> The parties agree that nothing in the Agreement will prevent the Plaintiff from continuing to pursue his claim against Dr. Joaquin Tenorio, in his official capacity as Secretary of [the Department of Labor and Immigration], for declaratory relief regarding the issue of whether he has the right to freely market his labor in the common occupations of life to any prospective employer without restriction and on equal terms as any citizen for so long a period as Plaintiff is lawfully admitted to the CNMI as a nonresident worker.

In both this paragraph and his complaint, Sagana asserts a right to be on "equal terms as any citizen"; he alleges discrimination on the basis of his alien status. He contends that the NWA, in limiting his ability to freely make contracts regarding his employment, violates his federally guaranteed rights. Additionally, Sagana's Motion for Leave to File Supplemental Authorities indicated that he was pursuing a § 1981 claim. *See Am. Timber & Trading Co. v. First Nat'l Bank,* 690 F.2d 781, 786 (9th Cir. 1982) (holding that one party's pursuit of discovery on an issue put the opposing party on notice of the issue). Tenorio had "fair notice" of the § 1981 claim. *See Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512 (2002); *accord Acequia, Inc. v. Clinton,* 34 F.3d 800, 814 (9th Cir. 1994).

Although Sagana did not explicitly specify § 1981 in his complaint, this omission is not fatal to his claim. "A party need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case." *Am. Timber,* 690 F.2d at 786 (citations omitted); *see also Cabrera v. Martin,* 973 F.2d

735, 745 (9th Cir. 1992) (stating that pleading facts underlying a § 1983 claim without naming the actual statute is sufficient); *Haddock v. Bd. of Dental Exam'rs,* 777 F.2d 462, 464 (9th Cir. 1985); *Greenwood v. Ross,* 778 F.2d 448, 454-55 (8th Cir. 1985). We long ago rejected the argument that a specific statute must be named, describing it as an "attempt to evoke wholly out-moded technical pleading rules." *Bowers v. Campbell,* 505 F.2d 1155, 1157 n.2 (9th Cir. 1974). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz,* 534 U.S. at 514 (citation, brackets and internal quotation marks omitted). Such an extreme circumstance does not exist here.

B. Section 1981 and Alienage Discrimination

In a footnote, the district court stated in the alternative that Sagana's § 1981 claim would have been foreclosed even if the claim had been properly pleaded, because the court would have been compelled by our decision in *Magana v. CNMI,* 107 F.3d 1436 (9th Cir. 1997), to dismiss a § 1981 claim based on alienage discrimination.[2] *Magana* does not support the footnote. *Magana* did not decide whether § 1981 applies to discrimination on the basis of alienage.

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[2] The district court footnote reads, in full: "The court concludes that no discussion is necessary regarding Sagana's argument that the Ninth Circuit 'wrongly decided' *Magana* and that § 1981 was really intended to prohibit state-sponsored discrimination based on alienage. The court is bound by *stare decisis* and may not overrule the Ninth Circuit." Order at 6-7 n.5.

Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . . " 42 U.S.C. § 1981(a). The right to dispose of one's labor freely by contract is at the heart of the protections afforded by § 1981. *See Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 441 n.78 (1968).

Congress chose with care the word "persons" to replace "citizens" in the statute when, in reenacting the 1866 Civil Rights Act, it extended the safeguards of the civil rights statutes to aliens.[3] *Id.* (citing Cong. Globe, 41st Cong., 2d Sess. 1536 (1870)); *accord Gen. Bldg. Contractors Ass'n., Inc. v. Pennsylvania,* 458 U.S. 375, 386-87 (1982); *Anderson,* 156 F.3d at 173 ("The use of 'persons' rather than 'citizens' was deliberate."). In *Graham v. Richardson,* 403 U.S. 365 (1971), the Supreme Court determined that states could not restrict the eligibility for welfare benefits solely on the basis of alienage. The Court

[3] Section 1981 originally appeared as § 1 of the Civil Rights Act of 1866, 14 Stat. 27, and was reenacted and slightly amended by the Act of May 31, 1870, 16 Stat. 144. *See Runyon v. McCrary,* 427 U.S. 160, 168-70 n.8 (1976). We do not here recapitulate the full legislative history and historical context of § 1981. We instead gratefully acknowledge other courts' thorough investigations into the statute's origins, which provide ample edifying fodder for the hungry reader. *See, e.g., McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 287-96 (1976); *Anderson v. Conboy,* 156 F.3d 167, 172-75 (2d Cir. 1998) (noting that the primary motivation for the 1870 amendment to the statutory text was to protect Chinese aliens from undue discrimination); *Bhandari v. First Nat'l Bank of Commerce,* 829 F.2d 1343, 1345-48 (5th Cir. 1987), *vacated,* 492 U.S. 901 (1989), *reinstated,* 887 F.2d 609 (5th Cir. 1989); *De Malherbe v. Int'l Union of Elevator Constructors,* 438 F. Supp. 1121, 1136-42 (N.D. Cal. 1977).

cited § 1981 to show Congress's intention to provide protections to "[a]ll persons within the jurisdiction of the United States," and went on: "The protection of this statute has been held to extend to aliens as well as to citizens." *Id.* at 377 (citing *Takahashi v. Fish & Game Comm'n,* 334 U.S. 410, 419 n.7 (1948)); *see also Duane v. GEICO,* 37 F.3d 1036, 1040 (4th Cir. 1994). In interpreting a different part of § 1981's precursor statute, our court agreed, holding that the phrase "all persons within the jurisdiction of the United States" was specifically intended to encompass aliens. *United States v. Otherson,* 637 F.2d 1276, 1282 (9th Cir. 1980).

The question of who can claim the protections of § 1981 is different from that which asks what protections it affords. Both the Supreme Court and other circuit courts have considered § 1981 to protect primarily against racial discrimination. *See, e.g., Keating v. Carey,* 706 F.2d 377, 384 (2d Cir. 1983) ("[A]lthough the courts have not limited the statute's proscription of racial discrimination by employing a 'technical or restrictive meaning' of 'race,' neither have they strayed far from a racial discrimination analogy." (internal citation omitted)). The text of § 1981 circumscribes the kinds of protections that may be claimed under its auspices. The guarantee that "all persons" may enjoy the same rights that "white citizens" enjoy does not protect against discrimination on the basis of gender or religion, *Runyon,* 427 U.S. at 167; disability, *Aramburu v. Boeing Co.,* 112 F.3d 1398, 1411 (10th Cir. 1997); age, *Kodish v. United Air Lines, Inc.,* 628 F.2d 1301, 1303 (10th Cir. 1980); or political affiliation, *Keating,* 706 F.2d at 384.

However, the text also supports the interpretation that it bars alienage discrimination. Just as the word "white" indicates that § 1981 bars discrimination on the

basis of race,[4] the word "citizen" attests that a person cannot face disadvantage in the activities protected by § 1981 solely because of his or her alien status. For protection against alienage discrimination to be excluded from § 1981, the text would have to disclaim the citizenship distinction by comparing "all persons" to "white persons," or "all citizens" to "white citizens,"[5] instead of "all persons" to "white citizens," as the statute now reads. The significance we attach to the drafters' changing "all citizens" to "all persons" to hold that aliens fall under the statute's protections, also compels the conclusion that § 1981 protects against discrimination on the basis of alienage.

The Supreme Court has held that § 1981 prohibits alienage discrimination. *Takahashi,* 334 U.S. at 419-20 ("[§ 1981] and the Fourteenth Amendment on which it rests in part protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color."); *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). More recently, in *Graham,* the Supreme Court cited § 1981 in a Fourteenth Amendment case to show that Congress

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[4] The cases track the courts' heroic efforts to determine what constitutes "white-ness" and "race" for the purposes of a § 1981 claim. *See, e.g., Al-Khazraji v. St. Francis Coll.,* 784 F.2d 505, 517 n.17 (3d Cir. 1986), *aff'd,* 481 U.S. 604 (1976) (collecting cases considering the claims of "nontraditional" § 1981 plaintiffs).

[5] Sagana's claim of invidious discrimination based on his alien status is unlike a claim under Title VII, which specifies the types of discrimination prohibited (race, color, religion, sex, and national origin). No such specifications limit § 1981's language barring alienage discrimination. *Cf. Espinoza v. Farah Mfg. Co.,* 414 U.S. 86, 95 (1973) (interpreting Title VII to protect aliens but, because the statute specifically names national origin and not alienage as a prohibited distinction, "nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.")

intended aliens to enjoy broad constitutional rights regardless of their economic circumstances. *Graham,* 403 U.S. at 377. It is settled that § 1981 prohibits governmental discrimination on the basis of alienage. *Bhandari,* 829 F.2d at 1349 n.13; *Anderson,* 156 F.3d at 173-75 (using the text and legislative history of the 1870 Voting Rights Act to show that Congress intended § 1981 to bar alienage discrimination); *Duane,* 37 F.3d at 1040.[6]

Nothing in *Magana* precludes the employment of § 1981 to protect those who suffer discrimination because of their alienage. In *Magana,* we reversed the district court's holding that a plaintiff could not seek remedy under § 1981 for discrimination based upon the plaintiff's "nation of origin." *Magana,* 107 F.3d at 1446. *Magana* held that the plaintiff had, in fact, successfully alleged a claim of discrimination based on "race, ancestral or ethnic discrimination," and had therefore avoided the direct question of whether "nation of origin" discrimination could support a § 1981 claim. *Id.* at 1447.[7] *Magana* may be read

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[6] Decisions from other circuits make clear that distinctions made by governmental actors come within § 1981's purview. The current controversy over alienage discrimination under § 1981 focuses on whether private distinctions on the basis of alienage are barred. *Compare Bhandari,* 829 F.2d at 1349, 1351-52 (holding that § 1981 does not prohibit private alienage discrimination) *with Duane,* 37 F.3d at 1042-43 (§ 1981 does prohibit private alienage discrimination) *and Anderson,* 156 F.3d at 180 (same).

[7] The most relevant parts of *Magana* state:

> In addressing Magana's § 1981 claim, the district court cited portions of Magana's deposition. The court noted that when Magana was asked by [sic] why she thought she was being discriminated against, she answered: "because she was from the Philippines." From this, the court concluded that Magana alleged possible "nation of origin" discrimination, rather than racial, ancestral or ethnic discrimination. . . .

(Continued on following page)

to imply that § 1981 does not protect against discrimination on the basis of *national origin,* and such a reading would be consistent with the Supreme Court's language and plain holdings of our sister circuits. *See St. Francis Coll. v. Al-Khazraji,* 481 U.S. 604, 613 (1987) (indicating that a claim based "solely on the place or nation of his origin, or his religion" could not form the basis of a § 1981 claim); *Anooya v. Hilton Hotels Corp.,* 733 F.2d 48, 50 (7th Cir. 1984) (per curiam); *Keating,* 706 F.2d at 384; *Bullard v. OMI Ga., Inc.,* 640 F.2d 632, 634 (5th Cir. 1981). This does not foreclose § 1981's recognition of alienage discrimination. "Alienage discrimination is distinct from both national-origin and birthplace discrimination." *Anderson,* 156 F.3d at 171 n.5; *accord Espinoza,* 414 U.S. at 95 (holding that a statute that specifically prohibited national-origin discrimination did not protect against alienage discrimination). Any language in *Magana* about national-origin discrimination has no bearing on alienage discrimination claims under § 1981.

We hold that § 1981 prohibits governmental discrimination on the basis of alienage.

> The deposition transcript and Magana's complaint demonstrate that Magana . . . did not limit her discrimination allegations to national origin. She also alleged racial, ancestral or ethnic discrimination and consistently alleged that she was discriminated against "because of her race." . . .
>
> We are satisfied that her pleadings met the requirements for a claim of discrimination under § 1981.

Magana, 107 F.3d at 1446-47 (citations omitted).

C. Application of § 1981 in the CNMI

Tenorio argues that the district court's dismissal was also correct because § 1981 does not apply to the CNMI's immigration laws. Tenorio argues that the exemption in Covenant § 503(a) handed a generalized immigration power to the CNMI and that this power entitles the CNMI to plenary authority and judicial deference in its regulation of aliens. Tenorio reads more into § 503(a) than the section was intended to carry.

Immigration authority controls, who, where, when, how, and for how long, and the conditions under which, a visitor may enter and remain in a territory, but it does not necessarily deal with all the rights and duties of persons in a given jurisdiction after the entry has taken place. We need not reach the outer limits of the power of the CNMI with reference to residents, nonresidents, temporary workers, and other visitors.

The Covenant provides that, with a few exceptions, all laws in existence at the time of the Covenant's passage apply in the CNMI. Covenant § 502(a). The CNMI agreed to be bound by the dictates of the Thirteenth and Fourteenth Amendments and the statutes enforcing them. *Id.* §§ 501(a), 502(a).

In short, nothing in Covenant § 503 prevented the district court from reaching the merits on this issue.

II. Fourteenth Amendment Equal Protection Claim

The district court ruled against that part of Sagana's claim asserted under the Fourteenth Amendment's Equal Protection Clause, applying rational basis scrutiny to deny

his challenge to the NWA. Sagana appeals both the choice of scrutiny and the decision on the merits.

The Fourteenth Amendment applies to the CNMI "as if the Northern Mariana Islands were one of the several states." *Id.* § 501(a); *Basiente v. Glickman,* 242 F.3d 1137, 1143 (9th Cir. 2001); *Madarang v. Bermudes,* 889 F.2d 251, 252 (9th Cir. 1989). Aliens who are in the jurisdiction of the United States under any status, even as illegal entrants or under a legal fiction, are entitled to the protections of the Fourteenth Amendment. *Plyler v. Doe,* 457 U.S. 202, 211 (1982); *Yick Wo,* 118 U.S. at 369; *Wong v. INS,* 373 F.3d 952, 972-74 (9th Cir. 2004).

Equal protection claims are considered under a two-step analysis. First, an appellant must show that the statute in question "results in members of a certain group being treated differently from other persons based on membership in that group." *United States v. Lopez-Flores,* 63 F.3d 1468, 1472 (9th Cir. 1995). This hurdle is easily cleared. It is uncontested that the NWA is a discriminatory statute, treating nonresidents differently from residents and citizens. Order at 11; *see* 4 N. Mar. I. Code § 4411 (1999).

In the second step, a court assesses the legitimacy of a discriminatory statute under the appropriate level of scrutiny. The CNMI courts have twice employed intermediate scrutiny in assessing laws discriminating against or among aliens, including when examining provisions of the NWA. *Sirilan,* 1 N. Mar. I. Commw. Rptr. at 1118-19 (rejecting, under intermediate scrutiny, a CNMI constitutional challenge to the termination of the CNMI permanent resident program); *Kin v. N. Mariana Islands,* 3 N. Mar. I. Commw. Rptr. 608, 612 (D.N. Mar. I.1989) (applying intermediate scrutiny under the U.S. Constitution to

strike down an NWA section that provided for the retroactive deportation of the families of workers earning less than $20,000 per year); *see also Yang v. Amer. Int'l Knitters Corp.*, 789 F. Supp. 1074, 1078 (D.N.M.I. 1992) (holding that a provision of the NWA would fail under either rational or intermediate scrutiny). The CNMI government argues that we should exercise rational basis review rather than intermediate scrutiny, because the Covenant grants the CNMI the same plenary immigration power enjoyed by the United States. We need not reach the question of what level of scrutiny to apply, as the NWA survives under either rational or intermediate levels of review.

When enacting the NWA, the CNMI legislature stated that "it is essential to a balanced and stable economy in the Commonwealth that residents be given preference in employment and that any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers." § 4411(a); *see also Saipan Hotel v. NLRB*, 114 F.3d 994, 996 (9th Cir. 1997). The legislature also recognized that the stagnant CNMI economy needed temporary alien labor because the small resident working force was substantially occupied in public sector employment. § 4411(a). Additionally, the legislature sought to provide "enforcement, control and regulation of nonresident workers." § 4411(b).

The CNMI legislature has seen fit to create a temporary class of employees for the purpose of bolstering the CNMI economy, giving job preference to its residents, and protecting the wages and conditions of resident workers while enforcing a system to control and regulate its visiting laborers. These are reasonable, important purposes.

See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (1984) (recognizing the protection of American workers as a legitimate goal of immigration restrictions); *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991) (same); *Kin*, 3 N. Mar. I. Commw. Rptr. at 613 (finding that "controlling and regulating nonresident workers is an important governmental interest").

The key provisions of the NWA – those which set a preference for resident workers, § 4413, create procedures by which the government and employers coordinate to place residents in job openings, §§ 4431, 4432, set up a system for the government approval of nonresident labor contracts, §§ 4433, 4434, and facilitate enforcement and administrative review of the NWA program, §§ 4441-46 – are all sufficiently tied to the purposes stated above. Sagana has not shown that the NWA is not closely related to the CNMI's important governmental goals of boosting its economy, giving preference to its resident workers, and providing a system of regulating and accounting for its nonresident workforce. The limitation of Sagana's ability to contract his labor under the NWA does not violate his equal protection rights.

In holding that the NWA as a whole passes both rational basis review and intermediate scrutiny, we take no position on whether individual sections of the NWA would satisfy a more focused Equal Protection challenge. Our decision does not foreclose the possibility that discrete elements of the CNMI's temporary worker program could violate the equal protection rights of nonresident workers.[8]

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[8] Two separate provisions of the NWA already have been struck down on equal protection grounds. Section 4437(i) was found to violate

(Continued on following page)

Sagana does not prevail on his equal protection claim whether considered under rational basis review or intermediate scrutiny because he has not carried his burden to show that the NWA is not closely related to the CNMI's important government goals. Accordingly, the district court did not err in denying relief on Sagana's equal protection claim. We turn now to Sagana's due process claim.

III. Fourteenth Amendment's So-Called Substantive Due Process[9] Claim

The Fourteenth Amendment's Due Process Clause states, "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law." The substantive component of this Clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them. . . . " *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citation omitted). By doing so, "it serves to prevent governmental power from being 'used for purposes of oppression.'" *Id.* at 331-32

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equal protection by providing that immediate relatives of nonresident workers could not enter the CNMI unless the nonresident worker earned more than $20,000 and posted a bond to guarantee his or her dependents' repatriation costs. *Kin*, 3 N. Mar. I. Commw. Rptr. 608. Section 4434(f), barring nonworker residents from accessing the courts, was also stricken as unconstitutional. *Yang*, 789 F. Supp. 1074.

[9] This linguistically awkward juxtaposition of substance and process has embedded itself in constitutional jurisprudence, over the objection of some Supreme Court Justices and scholars. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 191 (1986); Alexander M. Bickel, *The Morality of Consent* (1975); John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5 (1978); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221 (1973).

(quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1855)). The Due Process Clause prohibits restraints on liberty that are arbitrary and purposeless, *Poe v. Ullman*, 367 U.S. 497, 543 (1961), but a claim under this clause is "cognizable only if there is a recognized liberty or property interest at stake." *Schroeder v. McDonald*, 55 F.3d 454, 462 (9th Cir. 1995) (citing *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972)); *see also Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). "[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted).

Restrictions on selecting and pursuing work are recognized by the Fourteenth Amendment's Due Process Clause. "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915) (citations omitted). More recently, the Supreme Court stated that "the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment." *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999); *see also Ry. Employees' Dep't v. Hanson*, 351 U.S. 225, 234 (1956) ("[T]he right to work, which the Court has frequently included in the concept of 'liberty' within the meaning of the Due Process Clauses may not be denied by the Congress." (citations

omitted)); *Schware v. Bd. of Bar Exam'rs,* 353 U.S. 232, 238-39 (1957); *Terrace v. Thompson,* 263 U.S. 197, 215 (1923) (protecting the "right to earn a livelihood by following the ordinary occupations of life"); *Dittman v. California,* 191 F.3d 1020, 1029 (9th Cir. 1999).

However, as we recognized in *Dittman,* 191 F.3d at 1031 n.5, the Court has never held that the right to pursue work is a fundamental right. The Court has stated that the "generalized" right to choose one's employment "is nevertheless subject to reasonable government regulation." *Conn,* 526 U.S. at 292. Our court has described the judicial review which applies to laws infringing on non-fundamental rights as a very narrow one. "[W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." *Wedges/Ledges,* 24 F.3d at 66 (emphasis in original). Sagana's claim fails. As explained above, there are legitimate reasons for creating and maintaining a temporary worker program, and in pursuing those goals, the CNMI violates no constitutional principles by conditioning an alien's entry on his or her willingness to enter into limited labor contracts.

IV. Conclusion

Our task here is to determine only whether the CNMI, by limiting a nonresident alien's ability to seek and engage in employment as a condition for entry, violates that alien's constitutional rights under the Fourteenth Amendment. Viewed at that level of abstraction, the NWA withstands challenge. We affirm the district court's summary judgment for the respondent on the equal protection

and due process claims. Although we reject the district court's conclusion that Sagana did not properly plead his § 1981 claim, we affirm the district court's dismissal on its merits, consistent with our holding on the equal protection claim. *See Gratz v. Bollinger,* 539 U.S. 244, 275-76 (2003); *Grutter v. Bollinger,* 539 U.S. 306, 343 (2003) (citing *Gen. Bldg. Contractors Ass'n,* 458 U.S. at 389-91, for the proposition that "the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause").

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

BONIFACIO VITUG SAGANA, Plaintiff, v. JOAQUIN A. TENORIO, et al., Defendants.	Civil Action No. 01-0003 ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT[1] AND DISMISSING CASE WITH PREJUDICE

Plaintiff Bonifacio Vitug Sagana (hereinafter "Sagana") moved the court for summary judgment regarding paragraph 52 of his complaint.

I. STATEMENT OF THE CASE

On December 20, 2000, Sagana, a nonresident worker, filed a complaint and petition for judicial review against Mark D. Zachares, Secretary of Department of Labor and Immigration, and the Commonwealth of the Northern Mariana Islands (hereinafter "CNMI") Department of Labor and Immigration (hereinafter "DOLI") in the Superior Court for the Commonwealth of the Northern Mariana Islands. In his complaint, Sagana sought declaratory

[1] Sagana moved for a judgment as a matter of law pursuant to FED. R. CIV. P. 50(a)(1). However, the court had directed the parties to file cross motions for summary judgment pursuant to FED. R. CIV. P. 56. *See* Amend. Order After Renewed Pretrial Conf. ¶ 3 (Oct. 2, 2002) and Order Setting Settle. Agreement Deadlines, Pldg. Sched., Page Limits, and Taking Trial Off Calendar ¶ 2 (Oct. 3, 2002). Only Sagana filed a motion, which was not the proper motion. However, the court will treat his motion as a motion for summary judgment.

relief, injunctive relief, monetary damages, and attorney fees against defendant Zachares, in his personal capacity and official capacity as Secretary of DOLI, pursuant to 42 U.S.C. §§ 1983 and 1988.[2] Sagana also sought judicial review of agency action against DOLI pursuant to 3 N. MAR. I. CODE § 4446 and 1 N. MAR. I. CODE § 9112.

On January 16, 2001, this matter was removed from the CNMI Superior Court to this court pursuant to 28 U.S.C. § 1441(a). A case management conference was held on February 23, 2001, where this matter was set for a bench trial on December 10, 2001. After subsequent motions to modify the case management scheduling order, the court ordered a new trial date of October 7, 2002.

On September 30, 2002, a renewed pretrial conference was held where the parties agreed to settle various aspects of the case. *See* Amend. Order After Renewed Pretrial Conf. ¶¶ 1-2 (Oct. 2, 2002). On October 2, 2002, a settlement hearing was held where, in the presence of the court, the parties reviewed and discussed all the terms of their settlement agreement. On October 3, 2002, the court issued an order directing defendants to prepare the settlement agreement, incorporating all substantive terms agreed to by the parties at the settlement hearing. *See* Order Setting Settle. Agreement Deadlines, Pldg. Sched., Page Limits, and Taking Trial Off Calendar ¶ 1 (Oct. 3, 2002). The court further ordered that the issue of "whether the plaintiff has substantive due process and equal protection rights to freely market his labor in the common

[2] On October 2, 2002, the parties stipulated that Joaquin A. Tenorio shall be substituted into the complaint, in his official capacity only, as the defendant to Sagana's First Cause of Action. *See* Joint Stip. to Substitute Party and Order (Oct. 2, 2002).

occupation of life to any prospective employer without restriction and on equal terms as any citizen for so long a period as plaintiff is lawfully admitted to the CNMI as a nonresident worker" would be submitted to the court in the form of Cross Motions for Summary Judgment. *Id.* at ¶ 2.

The parties' settlement agreement and stipulated judgment dated November 25, 2002, was filed with the court on December 3, 2002.

A. The Settlement Agreement

Pursuant to the Settlement Agreement, Sagana can pursue his claim against defendant Tenorio, in his official capacity as Secretary of DOLI, for declaratory relief regarding the issue of whether he has the right to freely market his labor. *See* Settle. Agreement ¶ 5 (Dec. 3, 2002). This issue originally appeared in paragraph 52 of Sagana's Complaint, which was part of Sagana's first cause of action. *See* Compl. ¶ 52 (Dec. 20, 2000). Paragraph 52 states:

> Plaintiff claims [the] right to a declaration by this court that DOLI may not restrict plaintiff's substantive due process and equal protection rights to freely market his labor in the common occupations of life to any prospective employer without restriction and on the equal terms as any citizen for so long a period as plaintiff is lawfully admitted to the CNMI as a nonresident worker.

Id. Sagana's first cause of action was against defendant Zachares, in his official capacity as Secretary of DOLI, pursuant to 42 U.S.C. §§ 1983 and 1988 for declaratory relief, injunctive relief, and attorney's fees. *Id.*

II. STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure states, in part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the matters on record which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986).

The non-moving party must set forth by affidavit or as otherwise provided in Rule 56 specific facts showing that there is a genuine issue of material fact for trial. *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103-1104 (9th Cir.), *cert. denied*, 107 S.Ct. 435 (1986).

III. DISCUSSION

The court finds this case suitable for decision without oral argument and relies on the pleadings filed by both parties. *See* Local Rule 7.1.a. ("Oral argument is at the discretion of the court. . . . ").

Sagana moved the court for summary judgment on ¶ 52 of his complaint. The narrow issue presented to the court for resolution is whether or not DOLI may restrict Sagana's substantive due process and equal protection rights to freely market his labor in the common occupations of life

to any prospective employer without restriction and on equal terms as any citizen for so long a period as he is lawfully admitted to the CNMI as a nonresident worker. Sagana claims this right under three independent grounds: (1) 42 U.S.C. § 1981; (2) the Equal Protection Clause of the Fourteenth Amendment; and (3) the Substantive Due Process under the Fourteenth Amendment.

Defendant Tenorio opposed Sagana's motion for five reasons: (1) Sagana's arguments were not raised in his complaint and, therefore, he cannot raise them now;[3] (2) the CNMI can regulate aliens under the Nonresident Workers Act (hereinafter "NWA") because of its unique authority to regulate its own immigration; (3) the proper standard of review for the CNMI's immigration laws is a "rational basis" standard; (4) under the proper standard of review, the CNMI has not committed a violation of the Equal Protection or Due Process Clauses of the Fourteenth Amendment; and (5) significant policy reasons militate against Sagana's request.

[3] Defendant Tenorio originally argued that Sagana did not properly raise alleged violations of 42 U.S.C. § 1981 and the equal protection and due process clauses of the Fourteenth Amendment. On February 13, 2003, Tenorio withdrew that argument, while still maintaining his argument that Sagana did not properly raise his 42 U.S.C. § 1981 claim. *See* Mot. to Modify Def.'s Opposition to Pl.'s Mot. for Judm. as a Matter of Law (Feb. 13, 2003).

A. 42 U.S.C. § 1981[4]

Sagana argued that the CNMI lacks legitimate power to deny him the rights the United States has provided under 42 U.S.C. § 1981. He argued that § 1981 preempts the CNMI's Non-Resident Workers Act because the Act, on its face, violates the rights of aliens under § 1981. The NWA classifies on the basis of alienage by restricting the contract rights of nonresident workers who are aliens, while U.S. citizens are generally free to contract and take any job(s) they want.

Sagana further argued that the court should apply § 1981 to this case. He argued that the Ninth Circuit "wrongly decided" *Magana v. Commonwealth of the Northern Mariana Islands*, 107 F.3d 1436, 1446-47 (9th Cir. 1997), when it held that § 1981 derives from the Civil Rights Act of 1866 and only prohibits discrimination based on race. *See* PL's Mot. for Judgment as a Matter of Law p. 13:10 (Oct. 18, 2002). Sagana instead argued that § 1981 was enacted to prohibit state-sponsored discrimination based on alienage. Sagana argued that the protections offered by federal civil rights laws must be viewed against the events of the time, and that a review of the historical events leading up to the enactment of § 1981 shows that

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[4] 42 U.S.C. § 1981(a) states that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and the full sand equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

this statute was intended to prohibit state-sponsored discrimination based on alienage.

Tenorio argued that the only thing left to be litigated in this case is paragraph 52 of Sagana's complaint and that paragraph does not mention the § 1981 violations that Sagana now alleges. Tenorio also argued that the Ninth Circuit in *Magana* held only that § 1981 bars racial discrimination, which Sagana concedes, but Sagana states is a wrong decision. Tenorio argued that § 1981 is inapplicable because Sagana does not and cannot claim that the NWA is racially discriminatory.

Defendant Tenorio's first argument is well taken, and the court need enquire no further.[5] Nowhere in the first cause of action does Sagana mention 42 U.S.C. § 1981. In fact, the first cause of action was limited to 42 U.S.C. §§ 1983 and 1988. *See* Compl. ¶¶ 48-57. "A party need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case." *American Timber & Trading v. First National Bank of Oregon*, 690 F.2d 781, 786 (9th Cir. 1982). *See also In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994) (stating that "the main purpose of the complaint is to provide notice of what plaintiff's claim is and the grounds upon which the claim rests. . . . [T]he plaintiff must at least set forth enough details so as to provide defendant and the court with a fair idea of the basis of the complaint and the legal grounds claimed for recovery."). Sagana's motion

[5] The court concludes that no discussion is necessary regarding Sagana's argument that the Ninth Circuit "wrongly decided" *Magana* and that § 1981 was really intended to prohibit state-sponsored discrimination based on alienage. The court is bound by *stare decisis* and may not overrule the Ninth Circuit.

does raise an argument that was not contemplated in the Settlement Agreement. Based on what was discussed at the renewed pretrial conference and the settlement hearing and what was memorialized in the Settlement Agreement, Sagana is only allowed to pursue his single claim against Dr. Tenorio, in his official capacity as Secretary of DOLI, for declaratory relief regarding the issue of whether he has the right to freely market his labor.

It was not the understanding of the court that Sagana would be arguing that certain sections of the NWA be declared void under 42 U.S.C. § 1981. More importantly, the single issue left for adjudication, memorialized as ¶ 5 of the Settlement Agreement, does not provide the defendant with any notice of the 42 U.S.C. § 1981 grounds upon which Sagana's claim now rests. The paragraph does not provide any hint that Sagana is alleging a violation of his civil rights due to alleged CNMI-sponsored discrimination based on alienage. Accordingly, Sagana's motion for summary judgment based on a violation of 42 U.S.C. § 1981 is DENIED.

B. The Equal Protection and Substantive Due Process Clauses of the Fourteenth Amendment

Sagana next argued that pursuant to § 501(a) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (hereinafter "COVENANT"),[6] the Equal Protection

[6] § 501(a) of the COVENANT states:

To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United

(Continued on following page)

Clause of the Fourteenth Amendment applies in the CNMI as if the CNMI were a State. Therefore, because the NWA discriminates against some and favors others based on alienage, the Act is subject to "strict scrutiny."[7] Sagana argued that, under this standard, the NWA cannot withstand constitutional muster because the CNMI does not have a compelling interest in discriminating against aliens in any form of private sector employment.

Sagana also argued that his substantive due process rights have been violated because the Fourteenth Amendment protects the liberty of all persons, including aliens, to work unrestricted and the NWA denies him this freedom.

Defendant Tenorio argued that the applicable standard for interpreting immigration laws under the U.S.

> States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: . . . Amendment Fourteen, Section 1:. . . . Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with the approval of the Government of the Northern Mariana Islands and of the Government of the United States.

See "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (codified as amended at 48 U.S.C. § 1681 (1988)).

[7] A statute survives "strict scrutiny" review of its constitutionality if its application results in disparate treatment of a suspect class, but there is a compelling government interest and the law or regulation is narrowly tailored to achieve that interest. *See Plyler v. Doe*, 457 U.S. 202 (1987).

Constitution is a "rational basis" standard[8] and that "strict scrutiny" only applies to the States. This is so because the States, unlike the CNMI, have no authority to implement their own immigration laws or to regulate the activities of aliens. This immigration power is usually reserved for the federal government. However, because the CNMI's authority over immigration is analogous to that of the federal government, "rational basis," or at the most, "intermediate scrutiny,"[9] should apply to challenges to the NWA. Tenorio argued that under either the rational basis or intermediate standards of review, the NWA does not violate the Equal Protection Clause because the provisions of the NWA are aimed at addressing legitimate CNMI government interests.

Tenorio further argued that Sagana does not have a viable substantive due process claim because the restraints DOLI places on Sagana's right to contract are reasonable and survive judicial scrutiny. Tenorio argued that the CNMI has important, legitimate interests in regulating and tracking the activities of nonresident workers and in policing its borders.

The Ninth Circuit has held that "analysis of an equal protection claim alleging an improper classification involves two steps." *McLean v. Crabtree*, 173 F.3d 1176, 1185 (9th Cir. 1999). The plaintiff "must first show that

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[8] A statute survives "rational basis" review if there is a rational relationship between the disparity of treatment and some legitimate government purpose. *See Pennel v. City of San Jose*, 485 U.S. 1 (1988).

[9] A statute survives "intermediate" scrutiny if its application results in disparate treatment to a semi-suspect class and the statute is substantially related to important governmental interests. *See Craig v. Boren*, 429 U.S. 190 (1976).

the statute, either on its face or in the manner of its enforcement, results in members of a certain group being treated differently from other persons based on membership in that group. Proof of discriminatory intent is required to show that state action having a disparate impact violates the Equal Protection Clause. Second, it is demonstrated that a cognizable class is treated differently, the court must analyze under the appropriate level of scrutiny whether the distinction made between the groups is justified." *Id.* (internal quotations and citations omitted).

The case at hand presents an additional analytical step. Before determining the appropriate level of scrutiny for judicial review of the NWA, the court must first determine whether the CNMI should be treated as a State when it comes to matters of immigration. Clearly, it should not. Pursuant to § 503(a) of the COVENANT, the CNMI, unlike a State, is not generally subject to the immigration laws of the United States.[10] The CNMI has the unique status of controlling its immigration. This is a power generally reserved for the federal government. *See United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9th Cir. 1995) (noting that Congress has plenary power to regulate immigration and naturalization under Art. I, Section 8,

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[10] § 503 of the COVENANT states:

> The following laws of the United States, presently not applicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress after termination of the Trusteeship Agreement:
>
> (a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States;. . . .

Clause 4 of the Constitution). Therefore, there are three issues before the court:

(1) Does the NWA, either on its face or in the manner of its enforcement, result in alien workers being treated differently from non-alien workers based on membership in that group?

(2) Is the CNMI treated as a State when it comes to matters of immigration?

(3) What is the appropriate level of judicial scrutiny to apply to the NWA?

First, Issue One is disposed of because the policy statement of the NWA itself states that the NWA is discriminatory in nature. The policy statement, codified at 4 N. MAR. I. CODE § 4411 (1999), states:

> (a) The legislature finds and declares that it is essential to a balanced and stable economy in the Commonwealth that residents be given preference in employment and that any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers.
>
> . . . [T]he employment of nonresident workers should be temporary and generally limited to the duration of the specific job or employment for which the alien was recruited.
>
> (b) It is the intent of the amendments to the act to provide stricter enforcement, control and regulation of nonresident workers. It is further the intent of this act to require resident workers to be at least 10 percent of every employer's management, . . . to prohibit the transfer of nonresident workers from

> one employer to another except as provided by law, to control the issuance of temporary work permits, to increase the job referral services provided to resident workers and to establish a four year maximum time period for nonresident worker[s] to remain in the Commonwealth.

Next, it is undisputed that the Fourteenth Amendment applies to the CNMI. *See* COVENANT § 501(a).

It is also undisputed that the CNMI is not generally subject to U.S. immigration laws. *See* COVENANT § 503(a). What is disputed is the status of the CNMI when one of its statutes is challenged for violation of the Fourteenth Amendment's Equal Protection Clause. Should the CNMI be treated as a State or is its position in regards to immigration powers more akin to that of the federal government?

Just as the United States Congress can control the entry of aliens into the U.S.,[11] the CNMI legislature controls the entry and employment opportunities of aliens in the Commonwealth. *See* COVENANT §§ 105 and 501-03. Therefore, in enacting and enforcing the NWA, the CNMI essentially occupies the position of the federal government, in that it can enact and enforce its own immigration laws.[12] Accordingly, a look at the federal immigration laws

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[11] *See Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972) (noting that Congress has plenary control over admission and exclusion of aliens) and *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (stating that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.").

[12] Analogizing the federal immigration laws and the NWA may be considered a "stretch" in some courts. However, the Supreme court and the Ninth circuit has shown great deference to the CNMI when it has

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pertaining to the granting of alien work visas provides some guidance to the court in determining the constitutionality of those parts of the NWA implicated by this motion.[13]

For example, a nonresident worker in the CNMI can be analogized to an H2-B temporary worker in the United States. The Untied States Bureau of Citizenship and Immigration Services (hereinafter "BCIS"), created under the Department of Homeland Security,[14] allows U.S. employers to petition for skilled and unskilled alien workers to obtain visas to temporarily work in the U.S. in

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faced challenges to the COVENANT. *See, e.g., Rayphand v. Sahlan*, 95 F. Supp.2d 1133 (D.N. Mar. 1, 1999), *aff'd sub nom. Torres v. Sablan*, 528 U.S. 1110 (2000) (three-judge panel of the district court held that the CNMI's malapportioned Senate did not violate equal protection because the "one person, one vote" doctrine is not a fundamental constitutional right guaranteed to residents of unincorporated territories); *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1992), *cert. denied*, 506 U.S. 1027 (1992) (holding that the land alienation restrictions of Article XII of the Commonwealth Constitution are not subject to equal protection attack); and *CNMI v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244 (1984) (holding that CNMI statutory provisions which state that trial by jury is not required in any civil action or criminal prosecution based on local law except when required by local law, do not violate either the Sixth or Fourteenth Amendments).

[13] *See* Immigration of Nationality Act, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101 *et seq.* (1977)).

[14] U.S. Department of Homeland Security, *Citizenship and Immigration Services: Serving Visitors and New Citizens* <http://www.dhs.gov/dhspublic/display?theme=57> (accessed April 7, 2003) ("The Department of Homeland Security (DHS) will administer the nation's immigration laws on March 1st when the Immigration and Naturalization Service becomes part of DHS. Through the bureau of Citizenship and Immigration Services (BCIS), DHS will continue the tradition of welcoming immigrants into the country by administering services such as . . . work authorization and other permits. . . .").

positions for which qualified U.S. workers are not available. Bureau of Citizenship and Immigration Services, *Employment Categories and Required Documentation* <http://www.immigration.gov/graphics/services/tempbenefits/ecrd_htm> (accessed April 7, 2003). *See also* 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (1997) (defining an H2-B temporary worker as an alien having a "residence in a foreign country which he has no intention of abandoning who is coming to the United States to perform other temporary service or labor if unemployed persons performing such service or labor cannot be found in this country. . . ."). the process of obtaining an H2-B visa for a temporary alien worker is very similar to that of a nonresident worker under the CNMI's NWA. For example, the BCIS requires an H2-B petitioner to show that unemployed persons capable of doing the job petitioned for cannot be found in the United States. *Id.* The H2-B petitioner is also required to apply for a certification from the U.S. Department of Labor certifying that "qualified persons in the United States are not available and that employment of the beneficiary(ies) will not adversely affect wages and working conditions of workers in the United States similarly employed. . . ." 8 C.F.R. § 214.2(h)(3)(i) (2002).[15] An employer who needs

[15] *See also* 8 C.F.R. §§ 214.2(h)(iii)-(v) (regulatory provisions for H2-B temporary labor certification on Guam) and 20 C.F.R. §§ 655.200-655.215 (regulatory provisions for H-2B temporary labor certification in nonagricultural occupations) (2002).

The Attorney General of the United States is charged with determining whether the entry of foreign workers meets this standard. 8 U.S.C. § 1184(c) (1997). The Attorney General has delegated this responsibility to the Commissioner of Immigration and Naturalization (*see* 8 C.F.R. § 2.1 (2002)), who, in turn, relies on the Secretary of Labor for the initial determinations. 8 C.F.R. § 214.2(h)(3) (2002). The Secretary of Labor relies upon the employment referral system established under the Wagner-Peyser Act (48 Stat. 113 (1933) (codified at 29

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foreign labor must first file an application for certification with the local public employment office and include a copy of the job offer with the application.[16] 20 C.F.R. §§ 655.201(a)(1) and (b)(1) (2002). Upon receiving the application, the employment office refers to the employer any qualified U.S. workers who are registered in their system. I Immigr. Law and Defense § 3:82 (Aug. 2002) (citing Department of Labor General Administration Letter No. 1-95, *Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations*, 60 Fed. Reg. 7216-7219 (Feb. 7, 1995)). The employer is also required to advertise the job vacancy in a newspaper of general circulation for at least three consecutive days or in a professional or trade publication. *Id.* The employer submits to the public employment office in writing the results of its recruitment efforts, identifying each U.S. applicant for the job, and explaining the job-related reasons for not hiring each U.S. worker. *Id.* The office then sends the application, results of recruitment, their prevailing wage rate findings, and other appropriate information to the regional office of the

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U.S.C. § 49 *et seq.* (1997))). These are the current regulations, although they may be amended due to the creation of the Department of Homeland Security. *See, e.g.*, U.S. Department of Homeland Security, *DHS Organization* <http://www.dhs.gov/dhspublic/interap/editorial/editorial_0086.xml> (accessed April 7, 2003) (stating that the Director of Citizenship and Immigration Services will report directly to the Deputy Secretary of Homeland Security).

[16] *See also* 20 C.F.R. § 655.203(c) (2002) (stating that the employer must include assurances that the job opportunity is open to all U.S. workers and that the employer will continue to seek United States workers until the foreign workers have departed for the employer's place of employment) and 20 C.F.R. § 655.202(a) (regulations require that "each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers.") (2002).

Employment and Training Administration (hereinafter "ETA"). *Id.* "The ETA regional office reviews the application and the results of recruitment to determine whether U.S. workers are available for the job and whether employment of the alien will adversely affect wages and working conditions of U.S. workers similarly employed, and decides whether to grant or deny the application." *Id.*

Similarly, the NWA requires that residents be given preference in employment before a job is open to a nonresident worker. 4 N. MAR. I. CODE § 4411 (1999). When an employer has a job vacancy, she is required to notify DOLI of the vacancy so that DOLI can inform citizens of the job opportunity. 4 N. MAR. I. CODE § 4431 (1999). If resident workers cannot be found to fill the job, the job vacancy is then advertised in a public medium for 15 days. 4 N. MAR. I. CODE § 4432 (1999). If there is still no resident worker to fill the job after the expiration of the 15 day publication period, the Secretary of DOLI determines under what conditions and for what period of time the employer shall be permitted to use a nonresident worker to fill the vacancy. 4 N. MAR. I. CODE § 4433 (1999).

The policy behind BCIS's requirements for an H2-B temporary worker visa is that BCIS wants "to ensure that the admission of aliens to work [in the United States] on a temporary basis will not adversely affect the job opportunities, wages, or working conditions of U.S. workers." Bureau of Citizenship and Immigration Services, *Employment Categories and Required Documentation* <http://www.immigration.gov/graphics/services/tempbenefits/ecrd.htm> (accessed April 7, 2003). Likewise, the CNMI's policy concerning nonresidents is that the employment of "nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers . . .

[and] should be temporary and generally limited to the duration of the specific job or employment for which the alien was recruited." *See supra* 4 N. MAR. I. CODE § 4411. Basically, the statutory and regulatory framework of both the Immigration and Naturalization Act and the Nonresident Worker Act is to give preferences to U.S. citizens over foreign workers for jobs that become available within the U.S. and the CNMI.[17]

Thus, based on the clear similarities between U.S. immigration policy, rules and regulations regarding H2-B temporary alien workers and the similar provisions of the NWA, and the fact that the CNMI holds a position analogous to the federal government when it comes to matters of immigration, it follows that the appropriate level of judicial scrutiny to apply to the NWA is a "rational basis"

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[17] Sagana argued that the NWA is a "labor" statute that should not be confused with "immigration" laws. Sagana is correct that the CNMI's labor and immigration laws are distinct and are codified separately in the N. MAR. I. CODE. *See* 3 N. MAR. I. CODE §§ 4411-4452 (Labor Code) and 4301-4382 (Immigration Code). However, it is through and because of its immigration power that the CNMI enacted the NWA and created the Department of Labor and Immigration to enforce the Act. The CNMI's labor and immigration laws are very much intertwined, such that one cannot stand without the other. In fact, pursuant to Executive Order 94-3 (effective Aug. 23, 1994), the CNMI's executive branch was reorganized, one result of which was that the Labor Division of the Department of Commerce and Labor was separated and a new department, the Department of Labor and Immigration, was created. *See* N. MAR. I. CODE § 4421 Commission Comment: Executive Order 94-3, §§ 301(a) ("There is hereby established a Department of Labor and Immigration which shall have at its head a Secretary of Labor and Immigration."), 301(b) ("The Division of Labor and The Division of Employment Services are transferred from the Department of Commerce to the Department of Labor and Immigration.") and 301(c)(1) ("The office of Immigration and Naturalization is redesignated the Immigration Service and is transferred to the Department of Labor and Immigration as a division of that department.").

standard. *See Mathews v. Diaz*, 426 U.S. 67, 83-85 (1976) (upholding federal legislation that restricted certain aliens' eligibility for a medical insurance program because it was not "wholly irrational" and noting that the standard of scrutiny applied to state legislation does not govern judicial review of federal legislation involving alienage); *Dilingham v. Immigration and Naturalization Service*, 267 F.3d 996, 1005 (9th Cir. 2001) (stating that "because federal immigration matters is plenary, federal classifications differentiating between groups of aliens are subject to relaxed scrutiny. Such classifications will be held valid unless wholly irrational."); *Aleman v. Glickman*, 217 F.3d 1191, 1200 (9th Cir. 2000) (holding that federal statutory classification among aliens in the distribution of welfare benefits is subject to "rational basis" equal protection review); *City of Chicago v. Shalala*, 189 F.3d 598, 604-05 (7th Cir. 1999) (holding that a "rational basis" level of scrutiny should be applied to Congressional legislation of aliens' welfare benefits); *McLean*, 173 F.3d at 1186 n.11 (noting that federal laws that classify on the basis of alienage are subject to "rational basis" review because of the government's overriding national interests in immigration and foreign relations); and *United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9th Cir. 1995) (stating that judicial scrutiny of federal laws that classify on the basis of alienage receive "rational basis" review).

The challenged portion of the NWA survives "rational basis" review if there is a rational relationship between the disparity of treatment between residents and aliens and some legitimate government purpose. *Aleman*, 217 F.3d at 1200 (citing *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)). "A statutory classification must be upheld against equal protection challenge if there is any reasonably

conceivable state of facts that could provide a rational basis for the classification." *Aleman*, 217 F.3d at 1201 (citation omitted).

Aliens allowed to enter the CNMI under the NWA enjoy a privilege, not a right. The privilege granted by the CNMI is greater than that provided by the federal government. The United States has an annual cap of 66,000 visas issued for H-2B workers (*see* 8 U.S.C. § 1184(g)(B) (1997)), whereas the CNMI has no cap on the number of alien workers allowed to enter and work in the CNMI.[18] In fact, in order to address the concern "that the number of nonresident aliens in the CNMI has grown to the proportions of a political, economic, and social crisis,"[19] the CNMI Legislature passed Public Law 11-6, which, effective March 27, 1998, placed a moratorium on the hiring of nonresident workers. 3 N. MAR. I. CODE § 4601 (1999). Permitting aliens who are in the CNMI under a valid work permit to obtain part-time and/or other jobs without restrictions will, in effect, take away jobs from U.S. citizens. This potential outcome is contrary to the purpose and policy of the NWA.

The court finds that the CNMI has a rational basis for enforcing the NWA because its provisions which give job

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[18] The most recent figures compiled by the CNMI Department of Commerce indicate that, as of 2001, there were more than 36,000 alien workers in the CNMI. *See* CENTRAL STATISTICS DIVISION, DEPARTMENT OF COMMERCE, 2001 CNMI STATISTICAL YEARBOOK p. 52 table 4.22 (2002) (indicating that a total of 36,320 work permits were issued to non-U.S. citizens in calendar year 2001).

[19] 3 N. MAR. I. CODE § 4601 Commission Comment: Pub. L. No. 11-6, Section 1 (1999) (stating also that "[t]he restricted labor pool created by this legislation is a departure from the prior policy of the Commonwealth which allowed for very liberal importation of alien labor.").

preference to citizens (3 N. MAR. I. CODE § 4413) and require aliens to obtain DOLI approval for any new employment contract (3 N. MAR. I. CODE §§ 4434 and 4437), while effectively limiting the number of job positions open to nonresident workers, are rationally related to the CNMI's interests in preserving employment opportunities for its citizens and promoting economic self-sufficiency.[20]

Furthermore, the NWA does not completely prevent nonresident workers from "working in the common occupations of life." Instead, it places reasonable limitations on nonresident workers' ability to contract for employer while they are legally in the CNMI. *See, e.g.*, 3 N. MAR. I. CODE § 4437(d) (1999) ("No employer or nonresident worker shall execute any contract, make any other agreement, or change any existing contract . . . regarding the employment of such worker, without the approval of the chief. . . ."). In fact, the Act does permit other employment opportunities for nonresident workers. *See, e.g.* 3 N. MAR.

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[20] In the United States, H-2B temporary workers are only allowed to work for the employer who petitioned for their work visa. *See* 8 C.F.R. § 274a.12(b)(9) (2002) ("An alien in [H-2B] status may be employed only by the petitioner through whom the status was obtained.") and 8 C.F.R. § 214.1(e) (2002) ("A non-immigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a non-immigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act."). However, the alien may obtain a second job only after the second employer petitions for the alien, goes though the labor certification process, and gets final approval on her petition. 8 C.F.R. § 214.2(h)(2)(C) (2002) ("if the beneficiary will perform nonagricultural services for, or receive training from, more than one employer, each employer must file a separate petition with the Service Center that has jurisdiction over the area where the alien will perform services or receive training. . . .").

I. CODE §§ 4437(e),[21] and 4437(m),[22] 4602(a)-(c).[23] While these provisions do not grant Sagana the specific relief he requests – a declaration that he can freely market his labor to any employer without restrictions and on equal terms as any citizen for so long a period as he is lawfully in the CNMI as a nonresident worker – they do provide alien workers with a means of obtaining other employment while they are legally in the CNMI.

The limitations placed on alien workers are reasonable and survive rational basis scrutiny because the CNMI has legitimate interests in regulating and tracking the

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[21] A nonresident worker may, in certain circumstances, obtain subcontract work with another employer. 3 N. MAR. I. CODE § 4437(e) (1999):

> A nonresident worker shall not be permitted to perform any services of labor within the Commonwealth for any employer other than the employer for whom the chief has approved an employment contract with such worker, nor may a nonresident worker perform any services or labor on a subcontract between the employer of record an any other employer, ***except that the chief may approve such a subcontract between the employer for a particular job with a specified duration as part of the original employment contracts . . .***

(Emphasis added).

[22] A nonresident worker may, in certain circumstances, " . . . perform [ ] services or labor outside the employee's job classification; provided that such assignment is within the scope of employer's business, is not prohibited by statute, and it in the same occupational category. . . ." 3 N. MAR. I. CODE § 4437(m) (1999).

[23] A nonresident worker may, in certain circumstances, transfer from one employer to another during the contract period and after the initial contract period, provided that no qualified resident worker is available to fill the position to be filled by the transferring worker and all other requirements of the NWA have been satisfied. 3 N. MAR. I. CODE § 4602 (1999).

activities of its alien workers. For instance, the CNMI government needs to know how many nonresident workers are within its borders and how their numbers affect job opportunities for the resident workforce. The government also has to be able to gauge the nonresident workers' positive effect on Commonwealth society and the government tax base with the stain placed on medical, social, public works, and law enforcement resources. In addition, the CNMI has a rational basis for policing its borders, especially given the recent heightened security measures implemented in the United States and its Territories as to the entry and exiting of aliens. The NWA is rationally related to the CNMI's legitimate interest in maintaining accurate and timely documentation of all alien workers and their employers to ensure both the workers and employers' compliance with the Act. *See, e.g.*, 3 N. MAR. I. CODE §§ 4441-4446 (enforcement, hearing and review procedures) and 4447 (remedies and penalties) (1999).

The court concludes that the challenged provisions of the NWA are rationally related to the CNMI's legitimate interests of protecting employment opportunities, wages, and working conditions of United States citizens, promoting economic self-sufficiency, permitting employment opportunities of nonresident workers while protecting their rights, ensuring worker and employer compliance with the Act, and policing the borders of the CNMI. Accordingly, Sagana's motion for summary judgment based on a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment is DENIED.

C. Conclusion

For the abovementioned reasons, plaintiff Sagana's motion for summary judgment is DENIED. This disposes of the single issue left for the court to consider in this case. Thus, there being nothing further for the court to consider regarding this matter, the case is DISMISSED with prejudice and JUDGMENT is entered in favor of defendant Tenorio.

Pursuant to paragraph 7 of the Settlement Agreement, the court retains jurisdiction over this case for the purpose of enforcing the terms of the Settlement Agreement and for Orders in Aid of Judgment.

IT IS SO ORDERED.

DATED this 9th day of April, 2003.

/s/ Alex R. Munson
ALEX R. MUNSON
Judge

U.S. Constitution: Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA

- **Section 101**
- **Section 102**
- **Section 103**
- **Section 104**
- **Section 105**
- **Section 501**
- **Section 502**
- **Section 503**
- **Section 506**

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ARTICLE I

Political Relationship

Section 101. The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the "Commonwealth of the Northern Mariana Islands", in political union with and under the sovereignty of the United States of America.

Section 102. The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which, together with those provisions of the Constitution, treaties and laws of the United States

applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

Section 103. The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption.

Section 104. The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.

Section 105. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

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ARTICLE V

Applicability of Laws

Section 501.

(a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern

Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3 and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15, Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force with the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with the approval of the Government of the Northern Mariana Islands and of the Government of the United States.

(b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

Section 502.

(a) The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:

(1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and

Title XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands;

(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States; and

(3) those laws not described in paragraphs (1) or (2) which are applicable to the Trust Territory of the Pacific Islands, but not their subsequent amendments unless specifically made applicable to the Northern Mariana Islands, as they apply to the Trust Territory of the Pacific Islands until termination of the Trusteeship Agreement, and will thereafter be inapplicable.

(b) The laws of the United States regarding coastal shipments and the conditions of employment, including the wages and hours of employees, will apply to the activities of the United States Government and its contractors in the Northern Mariana Islands.

Section 503. The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:

(a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States;

(b) except as otherwise provided in Subsection (b) of Section 502, the coastwise laws of the United States and

any prohibition in the laws of the United States against foreign vessels landing fish or unfinished fish products in the United States; and

(c) the minimum wage provisions of Section 6, Act of June 25, 1938, 52 Stat. 1082, as amended.

Section 504. The President will appoint a Commission on Federal Laws to survey the laws of the United States and to make recommendations to the United States Congress as to which laws of the United States not applicable to the Northern Mariana Islands should be made applicable and to what extent and in what manner, and which applicable laws should be made inapplicable and to what extent and in what manner. The Commission will consist of seven persons (at least four of whom will be citizens of the Trust Territory of the Pacific Islands who are and have been for at least five years domiciled continuously in the Northern Mariana Islands at the time of their appointments) who will be representative of the federal, local, private and public interests in the applicability of laws of the United States to the Northern Mariana Islands. The Commission will make its final report and recommendations to the Congress within one year after the termination of the Trusteeship Agreement, and before that time will make such interim reports and recommendations to the Congress as it considers appropriate to facilitate the transition of the Northern Mariana Islands to its new political status. In formulating its recommendations the Commission will take into consideration the potential effect of each law on local conditions within the Northern Mariana Islands, the policies embodied in the law and the provisions and purposes of this Covenant. The United States will bear the cost of the work of the Commission.

Section 505. The laws of the Trust Territory of the Pacific Islands, of the Mariana Islands District and its local municipalities, and all other Executive and District and its local municipalities, and all other Executive and District orders of a local nature applicable to the Northern Mariana Islands on the effective date of this Section and not inconsistent with this Covenant or with those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands will remain in force and effect until and unless altered by the Government of the Northern Mariana Islands.

Section 506.

(a) Notwithstanding the provisions of Subsection 503(a), upon the effective date of this Section the Northern Mariana Islands will be deemed to be a part of the United States under the Immigration and Nationality Act, as amended for the following purposes only, and the said Act will apply to the Northern Mariana Islands to the extent indicated in each of the following Subsections of this Section.

(b) With respect to children born abroad to United States citizen or non-citizen national parents permanently residing in the Northern Mariana Islands the provisions of Sections 301 and 308 of the said Act will apply.

(c) With respect to aliens who are "immediate relatives" (as defined in Subsection 201(b) of the said Act) of United States citizens who are permanently residing in the Northern Mariana Islands all the provisions of the said Act will apply, commencing when a claim is made to entitlement to "immediate relative" status. A person who is certified by the Government of the Northern Mariana

Islands both to have been a lawful permanent resident of the Northern Mariana Islands and to have had the "immediate relative" relationship denoted herein on the effective date of this Section will be presumed to have been admitted to the United States for lawful permanent residence as of that date without the requirement of any of the usual procedures set forth in the said Act. For the purpose of the requirements of judicial naturalization, the Northern Mariana Islands will be deemed to constitute a State as defined in Subsection 101(a) paragraph (36) of the said Act. The Courts of record of the Northern Mariana Islands and the District Court for the Northern Mariana Islands will be included among the courts specified in Subsection 310(a) of the said Act and will have jurisdiction to naturalize persons who become eligible under this Section and who reside within their respective jurisdictions.

(d) With respect to persons who will become citizens or nationals of the United States under Article III of this Covenant or under this Section the loss of nationality provisions of the said Act will apply.

ARTICLE VI

Revenue and Taxation

Section 601.

(a) The income tax laws in force in the United States will come into force in the Northern Mariana Islands as a local territorial income tax on the first day of January following the effective date of this Section, in the same manner as those laws are in force in Guam.

(b) Any individual who is a citizen or a resident of the United States, of Guam or of the Northern Mariana

Islands (including a national of the United States who is not a citizen), will file only one income tax return with respect to his income, in a manner similar to the provisions of Section 935 of Title 26, United States Code.

(c) References in the Internal Revenue Code to Guam will be deemed also to refer to the Northern Mariana Islands, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof or of this Covenant.

Section 602.

The Government of the Northern Mariana Islands may by local law impose such taxes, in addition to those imposed under Section 601, as it deems appropriate and provide for the rebate of any taxes received by it, except that the power of the Government of the Northern Mariana Islands to rebate collections of the local territorial income tax received by it will be limited to taxes on income derived from sources within the Northern Mariana Islands.

Section 603.

(a) The Northern Mariana Islands will not be included within the customs territory of the United States.

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42 U.S.C. Sec. 1981. Equal Rights Under the Law.

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings, for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

NONRESIDENT WORKERS ACT

CHAPTER 4.

Nonresident Workers Act.

Articles
1. General.
2. Administrative Provisions.
3. Procedural Requirements.
4. Enforcement Provisions.
5. Other Provisions.

Article 1. General.

§ 4411. Nonresident Workers: Policy.
§ 4412. Nonresident Workers: Definitions.
§ 4413. Nonresident Workers: Preference for Resident Workers.
§ 4414. Conflict of Interest.

§ 4411. Nonresident Workers: Policy.

(a) The legislature finds and declares that it is essential to a balanced and stable economy in the Commonwealth that residents be given preference in employment and that any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers.

The legislature recognizes the need for alien labor at the present state of economic development but finds that the employment of nonresident workers should be temporary and generally limited to the duration of the specific job or employment for which the alien was recruited.

The legislature finds that specific data regarding job category needs, availability of resident labor in particular employment categories, and impact of apprentice training

programs, is currently minimal. It is the legislature's intent that the implementation of this chapter will generate reliable data upon which more specific alien labor policies can be developed.

(b) It is the intent of the amendments to the act to provide stricter enforcement, control and regulation of nonresident workers. It is further the intent of this act to require resident workers to be at least 10 percent of every employer's management, supervisory and nonsupervisory work force, which is to be increased at least two percent annually so that at the end of five years resident workers comprise of at least 20 percent of every employers management, supervisory and nonsupervisory work force, to prohibit the transfer of nonresident workers from one employer to another except as provided by law, to control the issuance of temporary work permits, to increase the job referral services provided to resident workers and to establish a four year maximum time period for nonresident worker to remain in the Commonwealth. Nonresident workers and their nonresident dependents shall not be eligible for permanent resident status.

Source: PL 3-66, § 2; amended by PL 5-32, § 2.

Commission Comment: PL 3-66, the Nonresident Workers Act, took effect August 18, 1983. PL 3-66, §§ 1, 20 and 22 repealed Trust Territory Code title 49.

Case Annotations: 3 N.M.I. 436-443; 4 N.M.I. 191-194.

§ 4412. Nonresident Workers: Definitions.

As used in this chapter, the term:

(a) "Agreement" means a nonresident employment agreement between the Chief of Labor and an employer pursuant to 3 CMC § 4433;

(b) "Available" means offering to perform any type of services or labor for an employer at the time and place, and under the terms and conditions, designated by such employer;

(c) "Certificate" means a certificate of labor and immigration issuable by the director pursuant to 3 CMC § 4435(b);

(d) "Chief" means the Chief of Labor;

(e) "Contract" means a contract between a nonresident worker and an employer, pursuant to 3 CMC § 4434;

(f) "Director" means the Director of Commerce and Labor;

(g) "Division" means the Division of Labor of the Department of Commerce and Labor;

(h) "Employer" means any individual, partnership, association, or corporation hiring, employing, or otherwise engaging for compensation any resident worker or nonresident worker to perform services or labor within the Commonwealth, including any branch, agency, or instrumentality of the Commonwealth, but does not include the Trust Territory of the Pacific Islands or United States government;

(i) "Nonresident worker" means any available individual who is at least 18 years old and who is capable of performing services or labor desired by an employer and who is not a resident worker. Nonresident worker shall not include any immediate relative, spouse or children including legally adopted children of a U.S. citizen or any foreign investor; and

(j) "Job classification" means the job classification described and listed as an occupational group under the Dictionary of Occupational Titles. Each time the words "job title" appear in this division, the words "job classification" shall be substituted in its place.

(k) "Occupational category" means the nine occupational categories listed under the Dictionary of Occupational Titles issued by the U.S. Department of Labor, which includes the following:

(1) Professional, technical, or management occupation;

(2) Clerical and sales occupation;

(3) Service occupation;

(4) Agricultural, fisheries, forestry and relative occupation;

(5) Processing occupation;

(6) Machine trade occupation;

(7) Benchwork occupation;

(8) Structural work occupation; and

(9) Miscellaneous occupation.

(l) "Management" job classification shall mean the function of planning, organizing, coordinating, directing, controlling, and supervising any industrial or business project or activity with responsibility for results.

(m) "Supervisory" job classification shall mean the function to coordinate, direct, and inspect continuously and at first hand the accomplishment of industrial or business activity for ones employer.

(n) "Resident worker" means any available individual who is capable of performing services or labor desired by an employer, and who is a citizen or national of the United States as defined in the Constitution of the Northern Mariana Islands or who has been granted national or citizenship status pursuant to Commonwealth law or who is legally residing without restrictions as to employment in the Commonwealth.

Source: PL 3-66, § 3; amended by PL 5-32, § 3.

Commission Comment: With respect to the references to the "Director of Commerce and Labor," the "Chief of Labor," the "Department of Commerce and Labor" and the "Division of Labor," see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

Case Annotations: *Limon v. Camacho*, Civil Action No. 302-91 (Super Ct. July 11, 1994), *appeal filed*, Appeal No. 94-041 (N.M.I. 1994).

§ 4413. Nonresident Workers: Preference for Resident Workers.

Resident workers shall be given preference in employment in the Commonwealth. Nonresident workers shall be employed only as necessary to supplement the available labor force. No employer shall hire, employ, or otherwise engage for compensation any nonresident worker to perform services or labor in the Commonwealth except in strict accordance with the provisions of this chapter and any rule or regulation issued under this chapter.

Source: PL 3-66, § 3.

§ 4414. Conflict of Interest.

No employee or official of the Department of Commerce and Labor or Division of Immigration, or his or her immediate relative as defined in 3 CMC § 4303(m), shall own or have an equity interest in an employment agency or business engaged in recruiting or bringing into the Commonwealth a nonresident worker.

Source: PL 5-32. § 4.

Commission Comment: This section took effect October 27, 1987. With respect to the references to the "Department of Commerce and Labor" and the "Division of Immigration," see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

Article 2. Administrative Provisions.

§ 4421. Chief of Labor: Functions and Duties.
§ 4422. Statistical Data.
§ 4423. Federal Grants and Programs.
§ 4424. Rules and Regulations.
§ 4425. Annual Report.

§ 4421. Chief of Labor: Functions and Duties.

For the purposes of this chapter, and without limitation on the scope or extent of powers, duties, and responsibilities vested by any other provision of law, the chief shall, under the supervision of the director, have the following functions and duties:

(a) Establish and maintain a system of registration, referral, and other employment services to assist potential resident workers in obtaining employment and assist employers in locating resident workers.

(b) Establish or recommend methods for alleviating shortages of resident workers and reducing the need for nonresident workers through such means as providing training to residents, and advising residents graduating from the Northern Marianas College or other training institutions, and making job referrals and job placements into the private sector. The term "graduate" includes those residents who have been awarded a degree or certificate in a business, tourism, industrial/technical or professional program established or sponsored by the Northern Marianas College or other institution(s) recognized by the Western Association of Schools and Colleges or other accrediting organization. In addition the Northern Marianas College is empowered to provide the levels of business assistance needed to properly assist business development in the Commonwealth.

(c) Oversee, monitor, and review the use of nonresident workers and all matters related to such use, including the health, safety, meals, lodging, salaries, and working hours and conditions of such workers, and the specific contractual provisions for the services or labor of such workers.

(d) Enforce, pursuant to 3 CMC §§ 4441-4446, the provisions of this chapter and any agreement which the chief enters into with any employer concerning the employment of nonresident workers.

(e) Require that employers accept such agreement or conditions for the payment of wages or benefits to nonresident workers, or any other agreement or contract provision, as the chief determines to be necessary and consistent with the policy and purposes of this chapter, and any such agreement, condition, or provision shall be legally enforceable in the courts of the Commonwealth.

(f) Establish occupational categories, minimum standards of qualification, and procedures for certification of nonresident workers.

Source: PL 3-66, § 5; amended by PL 5-32, § 5; PL 10-66, § 2.

Commission Comment: Executive Order 94-3, the "Second Re-organization Plan of 1994" (effective August 23, 1994), reorganized the Commonwealth government executive branch, changed agency names and official titles and effected numerous other revisions. According to Executive Order 94-3, § 301:

Section 301. Department of Labor and Immigration.

(a) **Department Established.** There is hereby established a Department of Labor and Immigration which shall have at its head a Secretary of Labor and Immigration.

(b) **Labor and Employment Services.**

(1) The Division of Labor and the Division of Employment Services are transferred from the Department of Commerce to the Department of Labor and Immigration. The Secretary of Labor and Immigration shall strengthen the Division of Employment Services to increase its ability to encourage and locate private sector employment for Commonwealth residents. The Secretary shall coordinate the functions of the two offices such that the availability of resident workers known to the Division of Employment Services is considered by the Division of Labor before non-resident worker certificates are issued.

(2) The functions of the Secretary of Commerce under Chapter 2 [of] 4 CMC, Division 9 [4 CMC § 9211 et seq.], relating to minimum wages and hours, are transferred to the Secretary of Labor and Immigration.

(3) The Wage and Salary Review Board is abolished and its records, property, facilities, equipment, and supplies transferred to the Department of Labor and Immigration.

(4) The State Job Training Coordination Council/Private Industry Council and the JTPA office are allocated to the Department of Labor and Immigration for purposes of administration and coordination.

(5) Pursuant to paragraph (2) of 3 CMC § 4424(a), the Secretary of Labor and Immigration

shall by regulation increase to not less than $200 the annual fee for the processing of the initial application and for each annual renewal of a non-resident worker certificate, provided that the additional funds collected as a result of such increase shall be covered into the General Fund. On October 1, 1994, any funds remaining in the Commonwealth Non-resident Worker Fee Fund or in any account established pursuant to paragraph (1) of such subsection, shall be covered into the General Fund, may be reprogrammed by the Governor, and shall remain available for obligation until expended. The Governor may transmit to the Legislature revised budget estimates for Fiscal Year 1995 as necessary to conform to the provisions of this paragraph.

(c) **Immigration.**

(1) The Office of Immigration and Naturalization is re-designated the Immigration Service and is transferred to the Department of Labor and Immigration as a division of that department. The Immigration Service shall have at its head a Director of Immigration, who shall have all the powers assigned by law to the Immigration and Naturalization Officer, except any power transferred pursuant to Section 201 of this plan. The position of Immigration and Naturalization Officer is abolished.

(2) All functions of the Attorney General relating to immigration and naturalization, are transferred to the Secretary of Labor and Immigration except:

(A) any function transferred pursuant to Section 201 of this plan,

(B) the hearing of immigration appeals as provided in 3 CMC § 4336(d), and

(C) the constitutional function of legal representation.

The full text of Executive Order 94-3 is set forth in the commission comment to 1 CMC § 2001.

PL 10-66 took effect on August 1, 1997. PL 10-66, § 2 amended subsection (b) of this section.

According to PL 10-66, § 1:

> Section 1. *Findings.* The Legislature finds that changed circumstances require new direction in providing training for residents to supplant nonresidents in technical and professional fields. The Legislature also finds that the economy of the Commonwealth will be strengthened through the development of local small businesses, and that the Northern Marianas College Business Development Center provides counseling and technical assistance to facilitate that development.

§ 4422. Statistical Data.

The director shall prepare on an annual basis statistical data on all nonresident workers. The data shall provide a breakdown by occupational categories, job classifications, citizenship, and point of origin. Copies of the data shall be transmitted to the Northern Marianas College and to the legislature.

Source: PL 5-32, § 6 (repealing PL 3-66, § 11); amended by PL 10-66, § 3.

Commission Comment: This section took effect July 28, 1987. With respect to the reference to the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and

official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

PL 10-66 took effect August 1, 1997. According to PL 10-66, § 1:

> Section 1. *Findings.* The Legislature finds that changed circumstances require new direction in providing training for residents to supplant nonresidents in technical and professional fields. The Legislature also finds that the economy of the Commonwealth will be strengthened through the development of local small businesses, and that the Northern Marianas College Business Development Center provides counseling and technical assistance to facilitate that development.

§ 4423. Federal Grants and Programs.

The chief shall develop a list of all labor programs and services offered to state or local governments, employers, or individuals by the United States Department of Labor or any other agency or instrumentality of the United States, together with a statement regarding the eligibility of the Commonwealth for participation in such programs and receipt of such services, and the appropriateness of such programs and services to the Commonwealth. This list and statement shall be included in the annual report of the division transmitted pursuant to 3 CMC § 4447.

Source: PL 3-66, § 12.

Commission Comment: With respect to the reference to the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and

effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4424. Rules and Regulations.

(a) (1) The director shall promulgate rules and regulations to implement the intent of this chapter pursuant to the Administrative Procedure Act (commencing at section 9101 of title 1 of this code [1 CMC § 9101 et seq.]) including the written delegation of the director's duties as imposed herein to employee(s) of the division.

(2) The director shall by regulation establish an annual fee both for the processing of the initial application and for each annual renewal of a nonresident workers certificates.

(3) The Attorney General shall by regulation establish a fee both for processing of the initial application and for each annual renewal of an immigration entry permit for each immediate relative of a qualifying nonimmigrant alien.

(4) No fee may be charged for registration or referral of resident workers.

(5) All fees for the initial application and annual renewals of nonresident worker certificates shall be the responsibility of and shall be paid, without offset or charge back to the nonresident worker, by the employer. Calculation of periods for annual renewal of nonresident worker or dependent certificates shall begin on the date the nonresident worker or dependent arrives in the Commonwealth.

(6) The director may, by regulation, establish procedures for the renewal of nonresident

worker certificates, including letter renewal if no changes in the information contained on the initial application for the certificate has occurred as sworn to by the applicant under penalty of perjury.

(7) The Attorney General may, by regulation, establish procedures for the renewal of immigration entry permits for qualifying immediate relatives, including letter renewal if no changes in the information contained on the initial application for the immigration entry permit has occurred as sworn to by the applicant under penalty of perjury.

(b) The Commonwealth government, as an employer of nonresident workers is exempted from paying the annual application fee pursuant to this subsection.

(c) All fees collected pursuant to subsection (a) of this section shall be deposited into a special fund to be known as the "Commonwealth Nonresident Worker Fee Fund." The Director of Finance shall collect all direct all funds received for the fund into four separate accounts as set forth in subsection (1) below:

(1) Except as provided in this subsection, all of the fees collected shall be reserved and placed into an account known as the Northern Marianas College Human Resources and Business Development Account. An appropriation from this account shall be used only to fund business, tourism, industrial/technical or professional programs conducted or sponsored by the Northern Marianas College and for implementation of the Northern Marianas College business development programs. Of the fees collected, $500,000 shall be reserved for Work Experience

Training Program for students attending colleges and $450,000 shall be reserved for the Business Development Center. The program shall be administered and coordinated by the Northern Marianas College. All collected funds for the above programs shall be transferred to the Northern Marianas College for implementation of this chapter. The president of the college shall have expenditure authority of these funds. Additionally, of the fees collected, $75,000 shall be reserved for Tinian and $75,000 shall be reserved for Rota which shall be used for youth employment training programs on those islands. The mayors of Tinian and Rota shall have expenditure authority of these funds, and will, within 90 days after the end of each fiscal year, report to the Governor and the legislature on the expenditure of such funds. Additionally, $575,000 shall be reserved for the Division of Labor for use in enforcing the provisions of this chapter and to help meet the financial requirement and added workload created hereby. Funds reserved under this section shall require legislative appropriation annually. Funds provided for in this subsection shall not be subject to reprogramming, and shall be available without fiscal year limitation.

(2) Prior to the end of the fiscal year, the Northern Marianas College, shall submit an annual report to both houses of the legislature on details of the programs funded from the Human Resources and Business Development Account.

(d) A detailed management and fiscal report shall be submitted to the legislature no later than 30 days following the end of each fiscal year.

Source: PL 5-32, §§ 2, 7 (repealing PL 3-66, § 13); amended by PL 6-28, § 2; PL 10-66, § 4, modified.

Commission Comment: This section took effect July 28, 1987. With respect to the references to the "director" of Commerce and Labor, the "Department of Commerce and Labor" and the "Director of Finance," see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

PL 10-66 took effect August 1, 1997. PL 10-66, § 4 amended subsection (c) of this section. According to PL 10-66, § 1:

Section 1. *Findings.* The Legislature finds that changed circumstances require new direction in providing training for residents to supplant non-residents in technical and professional fields. The Legislature also finds that the economy of the Commonwealth will be strengthened through the development of local small businesses, and that the Northern Marianas College Business Development Center provides counseling and technical assistance to facilitate that development.

At the end of subsection (c)(2) of this section, the commission added the word "Account" to correct a typographical error.

§ 4425. Annual Report.

Within 120 days of the end of the government fiscal year, the chief shall prepare an annual report of the operations and activities of the division during the year.

The report shall include data regarding the number of nonresident workers employed in the Commonwealth during the year, the citizenship and point of hire of workers, the occupational categories or job titles filled by the workers, the number of accompanying family members, wage scales, and any other information regarding nonresident workers as may be appropriate. The report shall also include information regarding registration and referral of resident workers, the apprenticeship training program, and the list and statement regarding federal grants and programs required to be included in the report pursuant to 3 CMC § 4422. The report shall be transmitted through the director to the Governor and to the presiding officer of each house of the legislature and shall be public information.

Source: PL 3-66, § 17.

Commission Comment: With respect to the references to the "director" of the Department of Commerce and Labor and the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and affecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

Article 3. Procedural Requirements.

§ 4431. Procedure and Requirements: Employer Notifies Chief.
§ 4432. Procedure and Requirements: 15-Day Advertising.
§ 4433. Procedure and Requirements: Nonresident Employment Agreement.
§ 4434. Procedure and Requirements: Approval of Contract by Director.

§ 4435. Procedure and Requirements: After Contract Approved.
§ 4436. Preconditions for Employment of Nonresident Workers.
§ 4437. Restrictions and Obligations.
§ 4438. Health Certification.
§ 4439. Required Records.
§ 4440. Exemptions.

§ 4431. Procedure and Requirements: Employer Notifies Chief.

Any employer who desires to utilize the services of the division in locating resident workers to fill job vacancies or, if resident workers cannot be located, obtain permission to employ nonresident workers, shall notify the chief and report such vacancies, stating the place and nature of the employer's business, the number of workers desired, the occupational qualifications of these workers, the wages to be paid the workers, the date on which it is desired that employment commence, the island or islands on which the workers are desired, and any other information the chief may require or which the employer may deem appropriate. The chief may require the employer to justify any occupational qualification as appropriate to the nature of the position.

Source: PL 3-66, § 6.

Commission Comment: With respect to the references to the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4432. Procedure and Requirements: 15-Day Advertising.

Upon receipt of notification pursuant to 3 CMC § 4431, the chief shall first endeavor to fill the job vacancies reported by the employer by referral of resident workers registered with the division. In the event of inability to supply sufficient resident workers by such referral, the chief shall cause the existence of the vacancies and other applicable information regarding the jobs to be publicized. This publication shall include notice to all officers of the Department of Commerce and Labor, posting of notice in public places in the Commonwealth, advertising in a newspaper of general circulation in the Commonwealth, the use of the public media when appropriate, and any other means as the chief may determine to be feasible. This publication shall continue for a period of 15 days, except that the director may waive all or part of this period if he finds that a waiver is in the public interest and not inconsistent with the policy of this chapter.

Source: PL 3-66, § 6; amended by PL 6-28, § 3.

Commission Comment: With respect to the references to the "Department of Commerce and Labor," the "director" of that agency and the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4433. Procedure and Requirements: Nonresident Employment Agreement.

Not later than seven days after the date of expiration of the period of publication required pursuant to 3 CMC

§ 4432, upon a finding by the chief that there is no resident worker to fill any job vacancy announced in this publication, the chief shall determine under what conditions and for what period of time the employer shall be permitted to use a nonresident worker to fill the vacancy. If the employer desires to use a nonresident worker under these conditions, the employer shall enter into a nonresident employment agreement with the chief to this effect This agreement may apply to more than one vacancy, as the chief may, in his discretion decide, and shall include, in addition to any other provision the chief deems necessary, the following provisions:

(a) A statement that the employer requires one or more nonresident workers commencing on or about a stated date to perform services or labor on a stated island or islands;

(b) A statement of any occupational category or job Title covered by the agreement and any qualification which must be met by any nonresident worker employed pursuant to the agreement;

(c) A statement of the wages the employer is paying or intends to pay each nonresident worker for each vacancy, occupational category, or job title covered by the agreement;

(d) A statement that the employer agrees to comply with the conditions stated in the agreement, the minimum employment conditions and other requirements applicable to such workers pursuant to this chapter, and any other applicable provision of law including a spec c consent to entry pursuant to 3 CMC § 4442;

(e) A statement of the period of time for which the employer will be allowed to fill any position with a

nonresident worker before the employer must attempt to locate a resident worker for the position by again complying with the provisions of this section;

(f) A statement that any contract offered to a nonresident worker pursuant to the agreement shall be contingent upon approval by the chief;

(g) A copy of a draft nonresident employment contract in a form, containing provisions including occupational category or job title, term of employment, location of work, work schedule, wage scale for regular and overtime work, and any deductions from pay, as may be required by law. In lieu of this copy, a statement that an acceptable previously filed or prescribed contract form may be used; and

(h) A statement that the employer will secure a bond or other surety to each nonresident worker as provided in 3 CMC § 4435(a).

Source: PL 3-66, § 6.

Commission Comment: With respect to the references to the "chief" of Labor, see Executive order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001.

§ 4434. Procedure and Requirements: Approval of Contract by Director.

After entering into a nonresident employment agreement pursuant to 3 CMC § 4433, an employer may use a nonresident worker to fill the job vacancy covered by this agreement, subject to the following procedures and conditions:

(a) Prior to entry of the nonresident worker into the Commonwealth for employment under this chapter or, if the worker is already within the Commonwealth before commencing employment, the employer shall present to the chief the affidavit described in subsection (b) of this section, a fully executed employment contract between the employer and the nonresident worker which shall conform to the requirements of subsection (c) of this section and shall be contingent on: (1) approval by the chief, (2) the payment of the required fee, and (3) the disclosure of any other information or document required pursuant to the employment agreement or departmental regulations. Approval by the chief, as required by this section, is a review of the contract for compliance with the provisions of this chapter. Such review shall not subject the chief or the Commonwealth government to liability on the employment contract, even if the chief approves a contract which does not comply with all the provision of this chapter.

(b) The affidavit of the nonresident worker shall be sworn to by the worker and shall indicate:

(1) That the worker has a minimum of two years experience in the occupational field for which he or she is to be hired, except that two years total experience in any field shall suffice if the position is an unskilled position as designated by the chief;

(2) That the worker meets any occupational qualification for the position as published in the vacancy announcement required by subsection (b) of this section;

(3) The marital status of the worker, and the name, address, age, and relationship of any dependent;

(4) That the worker has not been convicted of a felony or other crime involving moral turpitude, except that the director may waive this requirement if the director finds that the presence of the worker in the Commonwealth would not be detrimental to the public interest; and

(5) If the affidavit of the nonresident worker is not executed in the Commonwealth, it shall be attested to under penalty of penury, as true by the employee's employment recruitment agency that shall be licensed to do business in the Commonwealth.

(c) The contract between the employer and the nonresident worker shall include specific itemization of any deductions from the employee's salary. No deductions may be levied against a nonresident worker unless:

(1) The expenses are specifically included in the employment contract entered between the employer and the nonresident worker and executed at the time of and place of recruitment of the nonresident worker;

(2) Expenses incurred by the employer for room and board are no more than the expenses actually incurred by the employer in providing such benefits; and

(3) Deductions of such expenses from employees compensation is not in violation of any applicable federal or Commonwealth law or regulation promulgated by the director.

(d) After reviewing the information and documents submitted pursuant to subsection (a) of this section and within 30 calendar days of its receipt the chief shall determine if the nonresident worker and

the employment contract meet all the requirements of this chapter. If the nonresident worker does not qualify, the chief shall notify the employer and the nonresident worker if the worker is within the Commonwealth, giving reasons for this determination in writing. If the employment contract is not in compliance, the chief shall prepare a corrective addendum to be executed by thee [sic] employer and the nonresident worker. When the chief is satisfied that all requirements have been met, he shall signify his approval on the employment contract and any addendum and notify the employer.

(e) (1) The Director of Labor shall not approve nonresident worker certificates for the following job classifications: taxi cab driver, secretary, bookkeeper, accounting clerk, messenger, receptionist, surface tour boat operator, bus driver, including tour bus driver, and telephone switchboard operator.

(2) The director shall not approve nonresident worker certificates for employment unless the number of resident workers employed by the applicant employer is at least equal to the number of nonresident workers employed by the applicant employer in any of the following job classifications: retail trade clerk, retail trade cashier, hotel front desk clerk, janitor, security guard, custodian, and tour guide. However, the director may conditionally waive this restriction in accordance with provisions of 3 CMC § 4436(b).

(3) The director, or his/her designated representative, shall insure that job classifications established by the employer, together with occupational qualifications and experience, are reasonable for the position being applied for, and in the event the director, or his/her designated representative,

determines that such job classification or occupational qualifications or experience is not reasonable for such position, the nonresident worker certificate shall not be approved.

(f) Notwithstanding 1 CMC § 9112, no civil action may be brought by a nonresident worker against an employer for violation of the Minimum Wage and Hours Act (4 CMC § 9211 et seq.) and/or the Nonresident Workers Act (3 CMC § 4411 et seq.) unless the nonresident worker has first filed a written complaint concerning those violations with the Chief of Labor no later than 30 days after the violation is alleged to have occurred. Said civil action, if any, shall be commenced in any court only after the director or his designee, after a hearing, has issued a decision on the complaint favorable to the nonresident worker and the employer fails or refuses to pay any assessment made by the director within 10 days after receiving notification of the director's decision, the entire sum of money that the decision says is owed by the employer to the employee. Such payment shall be made through the director.

(g) A nonresident worker who has left his or her employment whose contract of employment has expired, or who is no longer employed by the employer approved by the chief, shall not be permitted to remain in the Commonwealth. Except that, a nonresident worker shall be allowed to remain in the Commonwealth for a period not to exceed 20 days in order to pursue a civil action against his or her employer for a breach of their employment contract, other civil or criminal claims, or to pursue violations of any Commonwealth or federal labor law. Provided, however, for a claim made against an employer for failure to pay the contract wages, a nonresident worker shall only be allowed too [sic] remain in the Commonwealth for a period of 30 days in order to

pursue such action where a timely claim is made for failure to pay the contract wages and where the employer fails or refuses to pay the full sum of money as ordered by the director within the 10 day period provided by this section. A nonresident worker who has left the Commonwealth shall be allowed to return no sooner than five days before their scheduled trial date in the Commonwealth Superior Court or federal court. Such person will be required to exit the Commonwealth within three days after the termination of the trial, or any continuances thereof.

(h) Issuance of nonresident worker certificates for waitresses, excluding restaurants or coffee shops, shall be limited to 15 waitresses or hostesses per employer for the islands of Rotes and Tinian and 10 waitresses or hostesses per employer for the island of Saipan. The number of waitresses or hostesses shall be certified under penalty of perjury by the employer.

(i) The director shall not approve nonresident worker certificates for any position for employment within the Commonwealth government except for employment within the following government entities and under the following conditions:

(1) (A) In the Public School System for persons employed as of March 6, 1996; provided, however, that nonresident workers employed as classroom teachers or supervisory personnel of classroom teachers, including but not limited to coordinators off special education programs, and education specialists, must be a graduate of college or university in the United States, or which are accredited by United States accrediting associations, or alternatively, must be graduate of a college or university and shall pass, prior to being issued a nonresident worker certificate, a

"BESTE" test for English proficiency or its functional equivalent as designated by the Board of Education;

(B) In the Department of Public Health. Applicants for nursing positions shall be graduates of recognized colleges or universities with a degree in nursing science in his/her country of origin and shall successfully satisfy all-in-country licensing requirements prerequisite to employment as board-licensed and registered nurses.

(C) In the office of the Public Auditor; provided, however, that such nonresident workers shall meet minimal professional qualifications imposed by the Public Auditor.

(D) For technical and professional employees in the Technical Services Division and the Division of Environmental Quality of the Department of Public Works; provided, however, that such nonresident workers must meet professional qualifications imposed by the Secretary of the Department of Public Works.

(E) For instructors, research scientists and other technical and professional employees at the Northern Marianas College; provided, however, that such nonresident workers must be graduates of colleges or universities inn [sic] the United States, or colleges or universities which are accredited by United States accrediting associations, or, alternatively, that such nonresident workers shall have earned degree(s) from colleges, universities, or institutions abroad that are recognized by the Board of Regents and shall meet all other professional requirements set by the Board of Regents.

(F) In the Commonwealth Utilities Corporation for technical and professional employees.

(G) In the Department of Commerce for temporary or part-time employees as needed for censuses and statistical surveys.

(2) In coordination with the Office of Personnel Management, the Northern Marianas College or the Public School System, as the case may be, each Commonwealth government entity authorized to hire nonresident workers pursuant to this chapter shall develop a comprehensive manpower training and education plan. This plan must include a management intern program for employees to receive the necessary job-skills training and/or education to eventually fill the positions currently occupied by nonresident workers. At least 60 days prior to the beginning of each fiscal year, the hiring government entity shall report annually, in writing, to the presiding officers of each house of the legislature on the progress and status of this plan together with a funding request necessary to implement the plan. Failure of the government hiring authority to comply with this provision shall be grounds to suspend the privilege of hiring nonresident workers by the noncomplying entity.

(3) Except for the employment of medical doctors, midwives, and dentists by the Department of Public Health, the exceptions authorized herein shall expire on September 30, 2000.

Source: PL 3-66, § 6; amended by PL 5-32, § 8; PL 6-5, § 317; PL 6-25, § 4; PL 6-28, § 1; PL 6-36, §§ 2, 3; PL 6-39, § 5; PL 7-4, §§ 2, 3; PL 7-34, §§ 1, 2; PL 7-45, §§ 3, 4, 5, 6, 8; PL 9-55, § 2; PL 10-4, §§ 4, 5; PL 10-31, § 2, modified.

Commission Comment: PL 10-4, the "Nonresident Worker Extension Act," which amended subsections (e) and (i) of this section, took effect March 6, 1996. According to PL 10-4, § 2:

> Section 2. *Findings and Purpose.* The Legislature finds that current law exempts particular departments, agencies and other entities from the blanket prohibition on the hiring of nonresident workers by the Commonwealth Government and allows these entities to hire nonresident workers with limited restrictions. The Legislature also finds that sound social policy dictates that the Commonwealth Government reduce and eventually phase out its reliance an nonresident labor.
>
> The Legislature further finds that, in accordance with [PL 7-45], the exemptions for some of the entities have expired on September 30, 1995. The Legislature also recognizes that there is yet an insufficient locally available labor pool to supply the professional and technical needs for some of these Commonwealth, government entities. For example, the local labor pool is presently incapable of supplying sufficient numbers of doctors, dentists, nurses, auditors, mechanics and teachers. To accommodate both the social policy of phasing out nonresident labor and the economic reality of current continued need, it is the purpose of this legislation to provide a mechanism whereby the number of nonresident workers employed by the Commonwealth government will be reduced by governmental responsibility and accountability. This legislation will extend the sunset provision imposed by [PL 7-45] to September 30, 2000. The Legislature further finds that it was the intent of [PL 7-45] to restrict the Commonwealth government from hiring nonresident workers both directly, and indirectly through the use of manpower services or agencies.

It is the further purpose of this legislation to insure that all exempted government entities are actively working toward phasing out the reliance on nonresident workers, Therefore, this legislation requires each of the exempt government entities to develop a comprehensive manpower training and education plan in coordination with the Northern Marianas College and the Office of Personnel Management. This plan must include a management intern program for employees to receive the necessary job-skills training and/or education to eventually fill the positions currently occupied by non-resident workers. Furthermore, each government entity authorized under this Act to hire nonresident workers shall report annually, in writing, to the presiding officers of each house of the Legislature on the progress and status of this plan.

With respect to the references to the "director" of the Department of Commerce and Labor, the "chief" of Labor, the "Department of Public Health" and the "Department of Public Works" in 3 CMC § 4434, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

Case Annotations: 3 N.M.I. 110--117, 118, 120; 4 N.M.I. 191--193.

§ 4435. Procedure and Requirements: After Contract Approved.

(a) After receiving notice from the director that an employment contract has been approved, the employer shall deliver to the director a bond or other surety from a

recognized insurance company in an amount and form acceptable to the director to secure the faithful performance of the duties and responsibilities of the employer and the departure of the nonresident worker at the end of his period of employment. If the employer fails to make reasonable efforts to repatriate a nonresident worker, thereby allowing that worker to become an illegal alien, then said employer shall be liable for all deportation costs incurred as a result of such willful, knowing or negligent conduct. If the employer does not voluntarily pay the aforementioned costs within 30 days of notification, the Secretary of Labor and Immigration shall order the Director of Revenue and Taxation to deduct the total amount from the employer's NMTIT tax rebate; provided, that any such notification may be contested pursuant to the Administrative Procedure Act [1 CMC § 9101 et seq.]. All such payments and deductions shall be returned to the Alien Deportation Fund.

(b) The director and the Attorney General shall provide for a certificate to be used for both labor and immigration purposes. After receiving evidence of the bond or surety pursuant to subsection (a) of this section and after receiving any required fee, the director shall, within 30 calendar days, issue such certificate and forward it to immigration authorities for such immigration clearance as may be required by law. This certificate shall include:

(1) The name of the nonresident worker;

(2) The name of his or her employer;

(3) The occupational category or job title;

(4) The nonresident worker's legal residence;

(5) The nonresident worker's citizenship;

(6) The date of expiration of the certificate; and

(7) The number of the nonresident employment agreement under which the worker is employed.

The nonresident worker shall keep a copy of this certificate on his person, or otherwise readily available at all times.

(c) No later than 30 calendar days after receipt of the director's certificate, the Commonwealth immigration authority shall issue the appropriate entry documents or indicate specifically in writing its reasons for denying entry documents and transmit such denial to the director and the employer.

Source: PL 3-66, § 6; amended by PL 10-1, § 5.

Commission Comment: With respect to the references to the "director" of the Department of Commerce and Labor and the "Secretary of Labor and Immigration," see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4436. Preconditions for Employment of Nonresident Workers.

(a) No nonresident worker certificates shall be issued or renewed for an employer (other than a construction company or agricultural employer), unless the employer or one of the employer's officers swears under penalty of perjury that at least ten percent ("minimum percentage") of the employer's full-time work force in the

Commonwealth is comprised of resident workers and that this minimum percentage has increased at least at the rate of two percent per year until such time that resident workers comprise 20 percent of the employer's work force together with a sworn affidavit made under penalty of perjury listing the names, addresses, telephone numbers (if any), and the position applied for by citizens or permanent residents of the United States. Employers employing less than five but more than one employee shall employ at least one full-time resident worker.

(b) Provided, however, that if an employer demonstrates to the director that he is unable to reach or maintain the percentage of a resident work force required by subsection (a) of this section, or the one-to-one ratio required by 3 CMC § 4434(e), despite a good faith attempt to do so, the director may reduce the percentage to one is reasonably attainable under the circumstances.

(c) No employer shall employ a nonresident worker in the Commonwealth unless at all times the employer pays its workers their full wages at least biweekly in United States dollars in cash together with a receipt with which to verify wages, hours and deductions or in checks that can be cashed by the workers in the Commonwealth.

(d) (1) No nonresident worker certificate shall be issued or renewed for an employer unless the employer can document that all nonresident workers for whom the employer has received a certificate within the four years immediately preceding the application for such issuance or renewal are either currently employed by the employer, have been repatriated, have been transferred to another employer in the Commonwealth, or have died.

(2) In addition, any employer who fails to account for any such nonresident worker for whom the employer has received a certificate shall, after the chief has conducted an administrative hearing pursuant to 3 CMC § 4444, be subject to a fine of $500 for each such unaccounted for worker.

(3) Any corporation, an officer or director of which has been barred from employing nonresident workers under this subsection, shall likewise be barred from employing nonresident workers as long as such officer or director retains office with the corporation.

(e) A nonresident worker certificate shall not be issued or renewed for any position for employment with the Commonwealth government unless the Office of Personnel Management, the President of the Northern Marianas College, or the Commissioner of Education, as the case may be, certifies that no resident worker is available to fill the position.

Source: PL 5-32, §§ 9, 10 (repealing PL 3-11, § 7); amended by PL 6-28, § 6; PL 7-34, § 3; PL 10-4, § 3.

Commission Comment: This section took effect January 1, 1987.

PL 10-4, the "Nonresident Worker Extension Act" added subsection(e); with respect to that act, see the comment to 3 CMC § 4434. With respect to the references to the "director" of the Department of Commerce and Labor and the "chief" of Labor in this section, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission

comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4437. Restrictions and Obligations.

(a) No employment contract, or nonresident employment agreement, registration, certification or permit, or the presence of an alien within the Commonwealth pursuant thereto shall be grounds for naturalization or citizenship, or permanent residency except as may be otherwise provided by law.

(b) No nonresident worker employed pursuant to this chapter shall be paid less than any minimum wage applicable to the occupational category or job title of the worker and provided by law. Any employment contract under this chapter shall provide that any future increase in the applicable minimum wage prior to the expiration of the term of the contract shall apply to work performed under the contract on or after the effective date of the increase. Any period of time during which the worker is required to be present at any location within the Commonwealth designated by his or her employer shall be considered working hours for purposes of determining wages and overtime pay.

(c) All nonresident employment contracts under this chapter shall provide that the employer is responsible and liable for the insurance or payment of all medical expenses of the nonresident worker, including cost of referral and evacuation for medical treatment outside the Commonwealth, and cost of the embalming and transportation of the body back to the country of origin in the event of death of the nonresident worker.

(d) No employer or nonresident worker shall execute any contract, make any other agreement, or change any existing contract, in writing or otherwise, regarding the employment of such worker, without the approval of the chief, and no nonresident worker shall perform labor or services within the Commonwealth except pursuant to an approved contract or an approved change to this contract. Any nonresident employment contract or change thereto which has not been approved by the chief or which violates any provisions of this chapter shall, in the discretion of the chief:

(1) Be voidable;

(2) Be grounds for certificate revocation;

(3) Be grounds to disqualify an employer from further use of any nonresident labor.

(e) A nonresident worker shall not be permitted to perform any services or labor within the Commonwealth for any employer other than the employer for whom the chief has approved an employment contract with such worker, nor may a nonresident worker perform any services or labor on a subcontract between the employer of record and any other employer, except that the chief may approve such a subcontract between the employer for a particular job with a specified duration as part of the original employment contract. Provided, however, that the nonresident worker or a nonresident worker dependent/relative may be employed by the Central Statistics Division of the Department of Commerce on a temporary or part-time, subcontract basis as an enumerator and/or translator to assist with censuses and surveys, only, to be conducted by the Central Statistics Division. A nonresident worker who

violates any provision of this subsection shall be subject to immediate deportation.

(f) Each employer shall give to any nonresident worker within his or her employ a copy of the approved employment contract with the worker, and no employer shall withhold from a worker any identification certificate, passport, entry permit, or other document related to the status of the worker.

(g) A nonresident worker shall not be required to leave the Commonwealth to maintain certification or to renew certification.

(h) No nonresident worker whose first entry into the Commonwealth for purposes of employment occurs after July 28, 1987, shall have a financial interest in or operate or engage in any business or become an employer.

(i) Immediate relatives of nonresident workers shall not be issued immediate relative entry permits unless the nonresident worker is paid an annual wage or salary of more than $20,000 and posts with the Chief of Immigration a bond or other surety guaranteeing the repatriation of the family members for whom the nonresident worker seeks entry; provided, however, the income requirement of this subsection shall not apply for a period of not more than one year to nonresident workers whose immediate relatives were already in the Commonwealth on July 28, 1987.

(j) The director shall require that no application for renewal of a nonresident worker certificate be issued, unless the employer submits evidence of payment of the monthly employees withholding taxes and quarterly gross revenue taxes and attaches a copy of the employee's 1040 tax form.

(k) The director shall cancel the certificate of a nonresident worker if the director determines that a job position was advertised at a lower specified rate of pay but a nonresident worker is actually being paid a higher rate of pay subsequent to the nonresident worker certificate being issued.

(l) It shall be unlawful for an employer to hire or employ a person who is not lawfully in the Commonwealth or if such person is a nonresident worker if such nonresident worker's contract has not been approved by the chief.

Source: PL 3-66, § 8; amended by PL 5-32, §§ 9, 11; PL 6-28 §§ 4, 5; PL 6-39, § 4; PL 7-34, § 4; PL 7-45, § 7; PL 9-55, § 1, modified.

Commission Comment: With respect to the references to the "director" of the Department of Commerce and Labor, the "chief" of Labor and the "Chief of Immigration," see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4438. Health Certification.

(a) Any nonresident worker admitted to the Commonwealth for employment under the provisions of this chapter, or any person admitted as a member of the family of such worker, shall have in his possession a certificate of freedom from communicable disease. This certificate shall have been executed not more than 30 days preceding the date of entry into the Commonwealth by a physician licensed to practice medicine in the jurisdiction of issue.

(b) Within 10 working days of initial entry into the Commonwealth of a nonresident worker for employment under this chapter or, if the worker is already present in the Commonwealth for some other purpose, within 10 working days after the chief issues a nonresident worker identification certificate for the worker, the worker, together with any accompanying family member, shall undergo a physical examination in the Commonwealth performed by any medical physician licensed to practice general medicine in the Commonwealth by the Commonwealth Medical Professional Licensing Board. Any family member preceding or following the nonresident worker to the Commonwealth shall also undergo a medical examination by a medical physician licensed to practice general medicine in the Commonwealth by the Commonwealth Medical Professional Licensing Board within 10 working days after entry into the Commonwealth. The cost of any examination of a nonresident worker shall be borne by the employer. The cost of any examination of a member of the family of any nonresident worker shall be borne by either the worker or the employer, as the employment contract shall provide. The chief shall by regulation provide for annual physical examination of nonresident workers and family members in the Commonwealth by any medical physician licensed to practice general medicine in the Commonwealth by the Commonwealth Medical Professional Licensing Board when employment under this chapter will continue for more than one year. The cost of all examinations under this section shall reflect the total cost, including physician fees, of providing the examinations. Any nonresident worker or immediate family member who fails to comply with this section shall be subject to immediate deportation to the point of origin. All costs of repatriation of the nonresident worker shall be the responsibility of the employer.

(c) Any person subject to a physical examination pursuant to subsection (b) of this section shall surrender his or her certificate of freedom from communicable disease to the examining physician or other designated person at the time of the examination. Within 10 working days after the examination, the examining physician shall transmit the certificate to the Director of Public Health and Environmental Services for transmission to the chief, together with findings as to whether there is any medical reason that the person should not be permitted to remain in the Commonwealth under this chapter. This finding shall be based on the medical probability that any disease, whether or not communicable, or any disability or any other medical matter, would result in significant danger to the health of the inhabitants of the Commonwealth or in the need for prolonged medical care or treatment while in the Commonwealth.

(d) Upon receiving notice that there is any medical reason that any nonresident worker or family member should not be permitted to remain in the Commonwealth; the chief shall notify the employer and the nonresident worker, or family member, and the affected person shall immediately surrender his or her certificate to the chief for appropriate action. The chief shall transmit a copy of all pertinent documents through the director to the Attorney General for immigration control, and the employer shall make arrangements for the affected person to depart the Commonwealth. This departure shall take place at the earliest possible time that it is medically safe for the affected worker to travel,

Source: PL 3-66, § 9; amended by PL 5-32, § 12; PL 7-48, § 4.

Commission Comment: With respect to the references to the "chief" of Labor, the "director" of the Department

of Commerce and Labor and the "Director of Public Health and Environmental Services," see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4439. Required Records.

Any employer of any nonresident worker shall keep and present immediately upon demand of the chief or his authorized representative, and at such regular intervals as the chief may by regulation require, the following information:

(a) The name, address, age, domicile, citizenship, point of hire, and contract expiration date of each worker;

(b) The occupational category or job title, and the wage rate or salary, of each worker;

(c) Payrolls showing the number of hours worked each week, gross compensation, any deduction, and net payments made to each worker;

(d) The number of employment-related accidents to nonresident workers, the name of any injured worker, type of injury, treatment, amount of time lost from work, and whether hospitalization was required; and

(e) The number of illnesses of nonresident workers, whether or not employment-related, causing time to be lost from work, the name of any such worker, type of illness, treatment, amount of time lost from work, and whether hospitalization was required.

Source: PL 3-66, § 10.

Commission Comment: With respect to the references to the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4440. Exemptions.

(a) The chief, with the approval of the director, may authorize exemptions from the following sections or parts thereof: 3 CMC §§ 4431, 4432, 4433(g), 4433(h), 4434(c), 4435(a), 4437(c) and 4439(a)-(c). These exemptions shall be specifically enumerated in an exemption employer agreement and may be granted to an individual employer for a particular project described in the agreement. Nonresident workers entering the Commonwealth pursuant to an exemption agreement shall not be permitted to transfer to another employer or project and shall depart the Commonwealth within 20 days of completion of their work. No family members or relatives may be permitted to accompany workers entering pursuant to an exemption.

(b) This chapter shall not apply to any person who represents a foreign government in the Commonwealth in a diplomatic, consular, or similar official capacity, or assists in such representation, as certified by the Governor; provided, that the person does not perform any proprietary or commercial activity for which a business license or permit is required by law.

(c) This chapter does not apply to any person who qualifies as a holder of a certificate of foreign investment issued by the Director of Commerce and Labor.

Source: PL 3-66, § 16.

Commission Comment: With respect to the references to the "Director of Commerce and Labor" and the "chief" of Labor, *see* Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

Article 4. Enforcement Provisions.

§ 4441. Enforcement: Investigations.
§ 4442. Enforcement: Authority to Enter.
§ 4443. Enforcement: Personnel Support.
§ 4444. Enforcement: Administrative Hearing.
§ 4445. Enforcement: Administrative Review.
§ 4446. Enforcement: Judicial Review.
§ 4447. Remedies and Penalties.

§ 4441. Enforcement: Investigations.

The chief or his designee shall conduct investigations as the chief may deem appropriate and necessary to enforce this chapter, rules or regulations promulgated hereunder, or agreements or contracts entered pursuant hereto, or any injury to a nonresident worker, or working conditions, or employer-provided housing conditions, the chief shall investigate and report in writing to the director and Attorney General any death or injury of a nonresident worker which results in substantial physical or mental impairment.

Source: PL 3-66, § 14.

Commission Comment: With respect to the references to the "director" of the Department of Commerce and Labor and the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

Case Annotations: 4 N.M.I. 191-195.

§ 4442. Enforcement: Authority to Enter.

In order to enforce the labor laws of the Commonwealth, the chief or his designee may enter and search any worksite where nonresident workers are employed, or any nonresident worker employer-provided facility; provided only, that if the search is of a residential facility, only those rooms or portions of the facility where nonresident workers are actually residing may be searched. Such entry and search may be at any time work is in progress, or any other reasonable time, and may be for general inspection purposes or in furtherance of a specific investigation. As a condition of and in consideration of any approval to employ nonresident workers pursuant to this chapter, any employer is deemed to agree to entry and search pursuant to this section, and no warrant shall be required. Refusal to permit such entry, or refusal to allow a search, or deliberate obstruction of an entry or search, shall be in a violation of this chapter, and may result in sanctions against the employer and/or the revocation of the nonresident worker's work certificate.

Source: PL 3-66, § 14; amended by PL 9-5, § 4.

Commission Comment: With respect to the reference to the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4443. Enforcement: Personnel Support.

For purposes of carrying out responsibilities pursuant to this article, the chief, with approval of the director, may by agreement with another agency of the Commonwealth utilize with or without reimbursement the services, personnel, or facilities of the agency.

Source: PL 3-66, § 14.

Commission Comment: With respect to the references to the "director" of the Department of Commerce and Labor and the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4444. Enforcement: Administrative Hearing.

(a) If upon an investigation pursuant to 3 CMC § 4441, the chief has reason to believe that any provision of this chapter, or rule or regulation promulgated pursuant hereto, or any agreement or contract entered

hereunder, has been or is being violated, the chief shall, within 10 days; either:

(1) Issue a warning and request to correct the violation to the alleged violator, or

(2) Issue a notice of violation and conduct a hearing pursuant to 1 CMC § 9109.

(3) When the chief has elected to issue a warning and request to correct and the alleged violator has not complied within 10 days the director shall immediately issue a notice of violation and conduct a hearing pursuant to 1 CMC § 9109.

(b) For purposes of hearings conducted pursuant to this section and for purposes of 1 CMC §§ 9109 and 9110:

(1) "Agency" shall mean the chief or such hearing officer as may be appointed by the director, and

(2) The agency shall have general power to issue subpoenas, summon witnesses, require production of books, papers, documents and records, administer oaths, and such other powers as may be necessary to effectively implement this chapter.

(c) All hearings shall be commenced within 30 days of the issuance of the notice of violation. Notwithstanding any other provision of law, hearings may be public or closed at the discretion of the agency. Adequate notice shall be given to all parties and opportunity shall be made available to them to present such evidence as they may desire.

(d) The agency shall upon concluding the hearing issue findings, decisions and orders within 10

days. Issuance of findings, orders and decisions upon hearing shall be pursuant to 1 CMC § 9110, but shall not be judicially reviewable until final.

(e) In addition to such sanctions, orders and relief that may be elsewhere authorized the agency may:

(1) Cancel or modify a nonresident worker certificate;

(2) Cancel or modify a nonresident employment agreement;

(3) Cancel or modify a nonresident worker contract;

(4) Temporarily or permanently disqualify an employer from using any nonresident labor; provided, that if any employer has been found to be in violation of this act by the director after conducting an administrative hearing on two or more occasions such employer shall be subject to, in addition to any penalty pursuant to 3 CMC § 4447(e), a fine not to exceed $2,000 for every additional violation.

(5) Transfer an affected nonresident worker to another employer with the consent of the worker and new employer.

(6) Impose such other sanction, order or relief that may reasonably give effect to the purposes and provisions of this chapter.

(f) The chief shall immediately notify the immigration authority of any cancellation or modification of a nonresident worker labor and immigration certificate.

Source: PL 3-66, § 14; amended by PL 5-32, § 13.

Commission Comment: The commission deleted a reference in subsection (e)(5) to PL 3-11, § 7, now repealed. With respect to the references to the "director" of the Department of Commerce and Labor and the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes; set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

Case Annotations: 3 N.M.I. 110-118; 4 N.M.I. 191-193, 194, 195.

§ 4445. Enforcement: Administrative Review.

(a) Within 15 days of issuance any person or party affected by findings, orders or decisions of the agency made pursuant to 3 CMC § 4444 may appeal to the director by written notice. If no appeal is made to the director within 15 days of issuance of the original findings, orders or decisions shall be unreviewable administratively or judicially.

(b) Upon review the director may, at the director's discretion:

(1) Restrict review to the existing record;

(2) Supplement the record with new evidence;

(3) Hear oral argument;

(4) Hear the matter de novo, in which case the hearing shall be conducted pursuant to 1 CMC §§ 9109 and 9110.

(c) Upon completion of review the director shall confirm or modify the agency findings, order or decision in writing within 10 days. Any modification shall include supplemental findings. The director's decision shall constitute final action for purposes of judicial review.

Source: PL 3-66, § 14.

Commission Comment: With respect to the references to the "director" of the Department of Commerce and Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

Case Annotations: 3 N.M.I. 110-119.

§ 4446. Enforcement: Judicial Review.

Judicial review of a final action of the director is authorized after exhaustion of administrative remedies, and must be initiated within 15 days of the final action. Except as may be contrary to the provisions of this chapter, judicial review shall be pursuant to 1 CMC § 9112. Notwithstanding any other provision of law, however:

(a) Notice of all actions and proceedings pursuant to this section shall be served on the Attorney General, and

(b) Judicial review shall be confined to the record.

Source: PL 3-66, § 14.

Commission Comment: With respect to the reference to the "director" of the Department of Commerce and

Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

§ 4447. Remedies and Penalties.

(a) At the request of the director, or of the chief through and with the approval of the director, the Attorney General may institute a civil action in any court of record having jurisdiction for a temporary restraining order, injunction, or other appropriate remedy to enforce any provision of this chapter, or any rule, regulation, or order issued under this chapter.

(b) Any nonresident worker who is aggrieved by the failure or refusal of his employer to comply with the employment contract may make a complaint to the chief. The chief or his designee shall conduct an investigation under 3 CMC § 4441, take any action under 3 CMC § 4444, and shall make a determination in writing within 30 days of the filing of the complaint. Any appeal from the determination shall be made under 3 CMC § 4445; provided, that the director or his designee shall not take longer than 15 working days to render a decision on any appeal that is made to him. If the director determines that the employee is at fault and denies the relief requested by the employee in his complaint, the then present employer shall be liable for the health, safety, and welfare of the employee in the Commonwealth, pending the employee's repatriation as the director may order. Repatriation cost shall be the responsibility of the last employer employing a nonresident worker in the Commonwealth.

(c) If any person fails to comply with any provision of this chapter, or any rule, regulation, or order issued under this chapter, or any nonresident worker employment agreement, after notice of such failure and expiration of any reasonable period allowed by the chief for corrective action, the person shall be liable for a civil penalty of not more than $500 for each day of the continuance of such failure. Subject to the approval of the director, the chief may assess, collect, and compromise any such penalty. No penalty shall be assessed until the person charged with a violation has been given an opportunity for a hearing pursuant to 3 CMC § 4444.

(d) In any action taken directly by or on behalf of a nonresident worker, notwithstanding any other remedies that may apply, the worker that prevails in such action shall recover unpaid wages and overtime compensation, an additional equal amount as liquidated damages, and court costs. In all cases the court shall, as part of the judgment render a finding as to the merits of the action. The filing of an action which is determined by the court to be unfounded or without merit shall be considered a material breach of contract and shall prevent reentry into the Commonwealth by the nonresident worker in the event the nonresident attempts reentry into the Commonwealth within five years from the date of the court's decision. Any employer who violates the provisions of this chapter or breaches an employment contract with a nonresident worker, in addition to any other damages which may be awarded the nonresident worker by the court, shall be awarded reasonable attorney fees. However, attorney fees shall not be recoverable against the Commonwealth.

(e) Any person who violates any provision of this chapter or any regulation or order issued under this chapter, or who makes any false statement to the

chief or his authorized representative, or to the director, during the course of any investigation, hearing, or other proceeding under this chapter, shall, upon conviction, be punished by a fine of not more than $5,000 or by imprisonment for not more than one year or both.

(f) A nonresident worker shall not file suit to terminate his or her employment contract unless an unsuccessful good faith attempt has been made with the chief to settle the dispute the worker has with the employer. Similarly, an employer shall not file suit to terminate its employment contract with a nonresident worker unless an unsuccessful good faith attempt has been made to settle any dispute the employer has with the nonresident worker.

(g) It shall be unlawful and grounds for immediate deportation for any nonresident worker, after having filed a grievance as provided for in subsection (b) of this section, to perform services or labor for any employer other than that employer with whom he or she has an approved contract of employment.

Source: PL 3-66, § 15; amended by PL 5-32, §§ 14, 19.

Commission Comment: With respect to the references to the "director" of the Department of Commerce and Labor and the "chief" of Labor, see Executive Order 94-3 (effective August 23, 1994), reorganizing the executive branch, changing agency names and official titles, and effecting other changes, set forth in the commission comment to 1 CMC § 2001; see also the comment to 3 CMC § 4421.

Case Annotations: *Limon v. Camacho,* Civil Action No. 302-91 (Super Ct. July 11, 1994), *appeal filed,* Appeal No. 94-041 (N.M.I. 1994); 3 N.M.I. 110-117, 118, 119.

Article 5. Other Provisions.

§ 4451. Transition.

§ 4452. Authorization of Appropriations.

§ 4451. Transition.

Any employer using nonresident workers in the Commonwealth, and any nonresident worker within the Commonwealth, at the effective date of this chapter shall within one year comply fully with all provisions of this chapter, provided that no transfer or employer-worker contract or contract modification, extension, or renewal shall be permitted except in full compliance with this chapter. The provisions of 3 CMC §§ 4437(g), 4441 et seq. and 4447 apply to all employers and workers on and after August 18, 1983.

Source: PL 3-66, § 19, modified.

§ 4452. Authorization of Appropriations.

There is hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this chapter.

Source: PL 3-66, § 18.

(2)

No. 04-774

Supreme Court, U.S.
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In the

Supreme Court of the United States

BONIFACIO VITUG SAGANA,

Petitioner,

v.

JOAQUIN A. TENORIO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the mere protection of discrete interest groups against economic competition by other interest groups a legitimate state interest for purposes of the Equal Protection Clause?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. PLF's Economic Liberty Project protects the right to earn a living both through direct litigation and by participating as amicus curiae in appellate courts. PLF has participated as amicus curiae in cases such as *Powers v. Harris*, No. 04-716 (U.S. filed Nov. 22, 2004); *RUI One Corp. v. City of Berkeley*, No. 04-582 (U.S. filed Oct. 28, 2004); and *Bank of America v. San Francisco*, 309 F.3d 551 (9th Cir. 2002). Because of its history and expertise with regard to economic liberty and the right to earn a living, PLF believes its perspective will aid this Court in considering the petition for certiorari.

SUMMARY OF ARGUMENT

The Commonwealth of the Northern Mariana Islands (CNMI)—which is subject to the Fourteenth Amendment the same as a state, *Basiente v. Glickman*, 242 F.3d 1137, 1143 (9th Cir. 2001)—enforces a law known as the Nonresident Worker's Act (NWA), which places heavy restrictions on the employment of lawfully admitted alien workers. Among other things, the law requires employers who wish to hire nonresidents to notify the CNMI Department of Labor, which seeks resident workers

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

to place in the position instead. At least ten percent of an employer's work force must be made up of residents. The Department of Labor preapproves all employment contracts for nonresident workers, and employers are required to post a bond covering three months of wages, medical coverage, and repatriation expenses. Employers must pay nonresidents biweekly, in cash, and must pay a special minimum wage. The NWA forbids the hiring of nonresident workers for certain jobs entirely. *Sagana v. Tenorio*, 384 F.3d 731, 734-35 (9th Cir. 2004). Petitioner, a nonresident, challenged the NWA as a violation of the Equal Protection Clause.

The Ninth Circuit found that these restrictions are not designed to protect the public against dangerous or wrongful business practices, but are instead designed to "giv[e] job preference to its residents, and protect[] the wages and conditions of resident workers" against competition from lawfully admitted nonresidents. *Id.* at 741. These preferences, the court found, are legitimate state interests for purposes of the Fourteenth Amendment. In short, protecting a discrete economic interest group is, *per se*, a legitimate state interest.

This holding exacerbates a circuit split between the Fourth, Sixth and Tenth Circuits. The Fourth and Sixth Circuits have held that economic regulations must serve some public purpose rather than a mere intent to discriminate. *See, e.g.*, *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("protecting a discrete interest group from economic competition is not a legitimate governmental purpose"); *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1322 (4th Cir. 1994) (protectionism must "advance[] a purpose, beyond . . . naked preference . . . . [or] 'parochial discrimination' "). The Tenth Circuit, on the other hand, recently held that protecting a discrete interest group against economic competition is, in itself, a legitimate state interest, even where it bears no rational relationship to protecting the public health, safety, and welfare. *See Powers v.*

Harris, 379 F.3d 1208 (10th Cir. 2004), *petition for cert. filed*, (U.S. Nov. 22, 2004) (No. 04-716). This conflict can only be settled by this Court.

The decision below also disregards repeated holdings by this Court that, while states have broad discretion to regulate the economy and protect the public, such discretion does not allow states to discriminate against lawfully admitted aliens solely to benefit citizens. *See, e.g., Sugarman v. Dougall*, 413 U.S. 634, 643-45 (1973); *Cabell v. Chavez-Salido*, 454 U.S. 432, 436-38 (1982). The decision below ignores these holdings, and affirms the CNMI's authority to bar lawfully admitted aliens from certain occupations solely to protect the wages of residents.

Finally, the decision below implicates vital federal questions. The right to earn a living without arbitrary government interference is an essential component of the Fourteenth Amendment, and laws which broadly deny lawfully admitted aliens substantial opportunities for employment deprive them of an essential aspect of liberty. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976). The frequency with which states attempt to restrict the economic opportunities of outsiders for the benefit of political insiders, is alone testament to the importance of this Court's consideration of this case.

The decision below conflicts with the holdings of at least three other circuit courts, as well as the decisions of this Court, and implicates important questions of constitutional law. The petition for certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE NINTH CIRCUIT EXACERBATES A CONFLICT BETWEEN THE FOURTH, SIXTH, AND TENTH CIRCUITS REGARDING THE CONSTITUTIONALITY OF RAW ECONOMIC DISCRIMINATION

The court below upheld the explicitly discriminatory provisions of the Nonresident Worker's Act on the grounds that excluding nonresident workers raises the wages of resident workers. The decision below holds that economic protectionism, *per se*, is a legitimate state[2] interest:

> The CNMI legislature has seen fit to create a temporary class of employees for the purpose of bolstering the CNMI economy, giving job preference to its residents, and protecting the wages and conditions of resident workers while enforcing a system to control and regulate its visiting laborers. These are reasonable, important purposes.

Sagana, 384 F.3d at 741.

But holding that economic restrictions which are solely designed to give preference to residents at the expense of nonresidents is a legitimate state interest conflicts with the decision of the Sixth Circuit Court of Appeals in *Craigmiles*, 312 F.3d at 224, which holds that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." In that case, the State of Tennessee

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[2] Although the Commonwealth of the Northern Mariana Islands is not a state, it is subject to the Fourteenth Amendment in the same way as the states. With this in mind, amicus uses the term "state" when referring to the CNMI's relationship to the Fourteenth Amendment.

enforced an occupational licensing law which prohibited people from selling caskets without first obtaining an expensive and burdensome funeral director's license. The licensing law, the court found, had no connection to protecting the public from fraudulent or shoddy business practices, but was created solely to provide monopoly profits to those who already had the license. *See Craigmiles*, 312 F.3d at 225 (law had no "legitimate purpose other than protecting the economic interests of licensed funeral directors.").

As the *Craigmiles* court recognized, the government's authority to regulate the economy, though quite broad, does not allow "arbitrary nor discriminatory" regulations. *Nebbia v. New York*, 291 U.S. 502, 537 (1934). A licensing law is arbitrary or discriminatory when it has no "rational connection with the applicant's fitness or capacity to practice" the trade in question. *Schware v. Bd. of Bar Examiners of the State of N.M.*, 353 U.S. 232, 239 (1957). Thus, the Sixth Circuit held, a licensing law designed to accomplish nothing more than monopoly profits for legal insiders was unconstitutional. *See Craigmiles*, 312 F.3d at 228 ("The licensure requirement imposes a significant barrier to competition in the casket market [so as to] . . . . protect[] licensed funeral directors from competition . . . .").

Like the Sixth Circuit, the Fourth Circuit also held that mere economic protectionism is not a legitimate state interest. In *Setzer*, 20 F.3d 1311, the court held that a South Carolina law requiring cities to purchase products from in-state companies so long as the products were up to five percent more expensive than imported alternatives, violated the Equal Protection Clause of the Fourteenth Amendment. Relying on this Court's decision in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), the court of appeals noted that even under the deferential rational basis test, mere favoritism is not a legitimate state interest:

> In *Ward*, Alabama asserted that [giving market preferences to in-state industries] . . . was legitimate simply because it would benefit certain individuals . . . . But . . . "under the State's analysis, *any* discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another . . . ." Instead, the Court demanded not only that Alabama state that the line being drawn would benefit some group (a truism), but also that it articulate some legitimate reason for the line to be drawn at all. Looking into the second matter, the Court perceived . . . nothing more than "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent."

Setzer, 20 F.3d at 1321-22 (quoting *Ward*, 470 U.S. at 882, 878). In short, the Sixth and Fourth Circuits have held that economic regulations which create preferences must be justified by some legitimate public purpose, rather than mere favoritism to those who are more politically adept. This reflects the proposition that, in Professor Sunstein's words,

> government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another. The constitutional requirement that something other than a naked preference be shown to justify differential treatment [helps] ensur[e] that government action results from a legitimate effort to promote the public good rather than from a factional takeover.

Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1690 (1984).

The decision below ratifies discrimination against nonresident aliens in employment opportunities for the explicit purpose of raising the income of resident laborers. It is a raw

protectionist scheme based not on the protection of the public against dangerous or unfair business practices, but solely and admittedly to give "job preference to its residents, and protect[ ] the wages and conditions of resident workers." *Sagana*, 384 F.3d at 741. The court of appeals found this to be a legitimate state interest, *per se*, despite the Eighth Circuit's holding that "it is untenable to suggest that a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest. An intent to discriminate is not a legitimate state interest." *Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir. 1983).

On the other hand, the Tenth Circuit, in a decision on facts almost identical to those present in *Craigmiles*, upheld an Oklahoma law prohibiting people from selling caskets without a funeral director's license. *See Powers*, 379 F.3d 1208. The Tenth Circuit held that explicit economic protectionism per se is a legitimate state interest. *See id.* at 1221. Like the decision below, *Powers* holds that the rational basis test is not violated by economic regulations which discriminate against outsiders for the benefit of politically favored groups.

This division between the circuits is on a matter of vital importance. As the Tenth Circuit noted in *Powers*, "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments." 379 F.3d at 1221. Likewise, laws restricting the job opportunities of lawfully admitted aliens are a common constitutional problem. Hostility toward immigrants and immigration routinely has been predicated on competition for jobs. *See generally* Irene Scharf, *Tired of Your Masses: A History of and Judicial Responses to Early 20th Century Anti-Immigrant Legislation*, 21 U. Haw. L. Rev. 131, 137 (1999) ("Not only did business leaders attack the newcomers, but so also did organized labor, jealous of competition for jobs from the immigrants."); Thomas Sowell, *The Economics and*

Politics of Race 204 (1983) ("suppliers of labor . . . seek to restrict the numbers and categories of labor admitted.")

The Fourteenth Amendment, however, prohibits states from discriminating against newcomers in the search for employment. *See further Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (discrimination against out-of-state residents violates Privileges and Immunities Clause); *Sugarman*, 413 U.S. at 643-45 (law prohibiting lawfully admitted aliens from state civil service jobs violates Equal Protection Clause). As long ago as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court confronted an attempt by the State of California to restrict the employment opportunities of Chinese immigrants for the benefit of natives and white immigrants. There, the Court explicitly rejected economic protectionism as a legitimate state interest. *See id.* at 374 ("the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal . . . and a violation of the fourteenth amendment.").

The tendency of legislatures to restrict employment opportunities to favored constituencies is a constant threat to the rights of aliens who are entitled to the equal protection of the law. *See* Iris Chang, *The Chinese in America: A Narrative History* 38-156 (2003) (detailing California's 19th century legal discrimination which "ma[de] it difficult for the Chinese [immigrants] to find any work at all." *Id.* at 128.). The Court should grant certiorari to rectify the split between the circuits over whether economic protection of residents against competition from newcomers is a legitimate state interest.

II

THE DECISION BELOW DISREGARDS THIS COURT'S SETTLED PRECEDENT REGARDING THE LIBERTY OF LAWFULLY ADMITTED ALIENS TO ENGAGE IN A LAWFUL OCCUPATION, IMPLICATING IMPORTANT FEDERAL QUESTIONS UNDER THE EQUAL PROTECTION CLAUSE

The decision below is also directly contrary to this Court's repeated holding that the Fourteenth Amendment prohibits states from enforcing labor laws that discriminate against lawfully admitted aliens. *See, e.g., Yick Wo*, 118 U.S. 356; *Truax v. Raich*, 239 U.S. 33 (1915). In *Truax*, for example, the Court struck down an Arizona law which was "frankly . . . title[d] . . . . 'an act to protect the citizens of the United States in their employment against noncitizens . . . .'" *Id.* at 40-41. There, the Court held that mere economic protectionism against legally admitted noncitizens violates the Constitution.

Although *Schware*, 353 U.S. 232, did not involve aliens, it is instructive on the fact that the state has no legitimate authority solely to protect favored economic interest groups against economic competition from outsiders. Rather, economic regulations must aim at accomplishing some legitimate state interest in protecting the public health, safety, and welfare. In *Schware*, this Court held that a man who had been a member of the Communist Party could not be denied the opportunity to take the bar exam for that reason. The Court held that this violated the Fourteenth Amendment because it bore no connection to a legitimate requirement that a person demonstrate his qualification to practice: any legal qualification for engaging in a trade

> must have a rational connection with the applicant's fitness or capacity to practice . . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

Schware, 353 U.S. at 239.

Occupational licensing could not be used for the sole purpose of excluding those who are unpopular, the *Schware* Court held; rather, such laws must promote the legitimate state interests of protecting the public safety by ensuring that practitioners are qualified. But the NWA prohibits nonresident aliens from engaging in certain trades and professions solely to protect the income of the favored workers. Such a prohibition has no rational connection with Mr. Sagana's fitness or capacity to engage in a trade. Instead, it is a naked preference for resident workers, intended to "giv[e] job preference[s] . . . and protect[] the wages" of a politically powerful interest group. *Sagana*, 384 F.3d at 741. This violates the Equal Protection Clause.

In *Sugarman*, 413 U.S. 634, the Court held that a New York law limiting civil service positions to citizens of the United States violated the Equal Protection Clause. Aliens are "entitled to the shelter of the Equal Protection Clause," the Court held: "[t]his protection extends, specifically, in the words of Mr. Justice Hughes, to aliens who 'work for a living in the common occupations of the community.'" 413 U.S. at 641 (quoting *Truax*, 239 U.S. at 41). The state argued that the citizenship restriction served a legitimate state interest in preserving the state's political identity. *Sugarman*, 413 U.S. at 642-43. But the Court noted that the "breadth and imprecision"

of the restriction demonstrated that it did not serve this interest. *Id.* at 643. Rather, the law was a device for protecting residents from competing for civil service jobs—an interest the Court did not find legitimate. *See id.* at 644-45. *Accord, Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 603-04 (1976) (Puerto Rico law permitting only United States citizens to practice privately as civil engineers.)

Sugarman relied in part on *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), which struck down a California law prohibiting Japanese citizens from obtaining licenses to fish off the state's coast. *See id.* at 413. The Court held that, although the federal government may regulate immigration, such a power does not permit a state to "adopt . . . the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living." *Id.* at 418-19. Again, the law was designed to protect natives against competition from outsiders—an interest which the Court did not consider legitimate.

Bridging both *Sugarman* and *Schware*, the Court held in *In re Application of Griffiths*, 413 U.S. 717, 722-23 (1973), that Connecticut could not prohibit aliens from practicing the profession of law. The state "failed to show the relevance of citizenship" to fitness or capacity to practice. *Id.* at 724. Rather, the ban was a simple matter of protecting in-state lawyers from competition by outsiders, which the Court found unconstitutional. *Id.* at 720. *See also Hampton*, 426 U.S. at 116 ("broadly denying [aliens] substantial opportunities for employment . . . deprives [them] . . . of an aspect of liberty.").

In reviewing *Yick Wo*, *Sugarman*, *Takahashi*, and other cases, this Court explained that

> resident aliens fall within the protection of the Equal Protection Clause of the Fourteenth Amendment and . . . the state [may] not deny to aliens the right to carry on a 'harmless and useful occupation' available to citizens . . . . *Yick Wo* [and other cases] proclaimed that hostility toward aliens was not a permissible ground for a discriminatory classification . . . in the sphere of private employment.

Cabell, 454 U.S. at 436-37. The decision below directly conflicts with this principle, however, in holding that nonresident workers may be discriminated against in employment solely to boost the income of resident workers.

Whether protectionism *per se* is a legitimate state interest under the Fourteenth Amendment is a vital federal question. Protectionist legislation deprives persons of their right to earn a living, which this Court has held is " 'the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure,' " and of which lawfully admitted aliens may not be deprived. *Griffiths*, 413 U.S. at 720 (quoting *Truax*, 239 U.S. at 41). Indeed, Justice Douglas called the right to earn a living "the most precious liberty that man possesses." *Barsky v. Bd. of Regents of Univ. of State of New York*, 347 U.S. 442, 472 (1954) (Douglas and Black, JJ., dissenting). Discriminating against some people in the exercise of this right, simply to boost the income of political insiders, and to protect these insiders against fair economic competition, is just the sort of "arbitrary [and] discriminatory" regulation that the Fourteenth Amendment forbids. *Nebbia*, 291 U.S. at 537. The decision below ratifies discriminatory government action which lacks any connection to protecting public health and safety, but is explicitly designed to benefit private interests. Should that decision be allowed to stand, arbitrary and discriminatory economic regulation will remain a court-blessed

"legitimate state interest" for purposes of the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: January, 2005.

Respectfully submitted,

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